

# **Exhibit B**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

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SONY MUSIC ENTERTAINMENT, et al., :  
Plaintiffs, :  
: :  
-vs- : Case No. 1:18-cv-950  
: :  
COX COMMUNICATIONS, INC., et al., :  
Defendants. :  
: :  
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VOLUME 1

TRIAL TRANSCRIPT

December 2, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

1 BY MR. ZEBRAK: (Continuing)

2 Q. Mr. Cooker, why was it that you wanted the jury to hear  
3 some of that music today?

4 A. Well, I think it just is a good example of, you know,  
5 exactly what I was talking about, that emotion, passion, that  
6 connection. You know, hopefully at least one of those songs  
7 brought you back or reminded you of something that was  
8 important or made you feel better.

9 Again, it's that emotional connection. And,  
10 obviously, these are some of the most important recordings  
11 in -- in our company.

12 Q. So I would like to explore some basic music industry  
13 terms. Could you start by explaining what is the record  
14 industry?

15 A. Sure. The record industry is primarily focused on working  
16 with artists to create, market, and distribute their  
17 recordings. And, you know, to give you an example or explain  
18 that more clearly, you know, when you think of the biggest  
19 single of the year, "Old Town Road" with Lil Nas X, or you  
20 think about the two recent number one albums we had with Celine  
21 Dion, or with country star Luke Combs, or you think of Elvis  
22 Presley, it's the artists who you're thinking about, those are  
23 the people that we work with to market, distribute, and sell in  
24 the recording -- in the recording industry.

25 Q. And where is it within the overall music industry that the

1 record industry fits?

2 A. So again, that part is, you know, the exploitation of  
3 working with the performing artists. There is also the music  
4 composition, which is the songwriter actually writing the song.  
5 Sometimes that is the same as the artist performing, often it  
6 is not, there's a separate songwriter that contributes to it.

7 But beyond that, you know, there are retail partners,  
8 there are digital service providers, there are live  
9 performances in live venues, and an entire live industry, live  
10 music industry around that.

11 In addition to, you know, thinking about studios and  
12 recording studios and studio musicians and union employees, et  
13 cetera, that make up the overall music industry.

14 Q. So you mentioned -- I think you said digital service  
15 provider. But could you explain what you meant by that.

16 A. Yeah, sorry. I fall into that habit of using acronyms.  
17 So a digital service provider is really services that most  
18 people think about going and either listening to music or  
19 watching a movie or a film.

20 So, for example, Apple Music, Amazon, Spotify are  
21 examples of digital service providers.

22 Q. And what is a music publisher?

23 A. A music publisher is a company that works with the  
24 songwriter.

25 Q. And just to be clear, is there -- is a digital service

1 provider, or DSP, the same thing as Cox?

2 A. No. A digital service provider is a retail -- or a  
3 platform that ultimately is either selling or streaming music  
4 to consumers.

5 Q. So a DSP is different than an ISP?

6 A. DSP is different than an ISP, exactly.

7 Q. This is the Washington area where we're famous for our  
8 acronyms.

9 A. Sorry. So is the music industry. Sorry.

10 Q. And just so we have some clear terminology, what is a  
11 music download?

12 A. A music download is a track or an album that has been  
13 downloaded for purchase from a digital store, one of those  
14 DSPs.

15 Q. And what does music streaming refer to?

16 A. Music streaming is when a consumer is listening to music  
17 via a streaming service, like Spotify or Apple Music, where  
18 ultimately the music is -- is typically not downloaded or  
19 purchased by the consumer, but is experienced either through  
20 add supported or a subscription type of payment method.

21 Q. And what does the term "sound recording" refer to?

22 A. Sound recording is the recording of a composition by an  
23 artist or a band. You know, in that medley I played, it ended  
24 with Adele's "Rolling in the Deep." "Rolling in the Deep" is a  
25 sound recording.

1 Q. Thank you. And you've referred to songwriters. Would you  
2 explain what a music composition is.

3 A. Sure. The music composition is the lyrics and the  
4 composition of the song that is ultimately performed by the  
5 artist.

6 Q. And who generally owns music compositions?

7 A. Typically the publishers own music compositions.

8 Q. Do record companies generally own musical compositions?

9 A. Generally they don't.

10 Q. So besides the music publishers and the record companies  
11 and the digital service providers, could you explain who some  
12 of the other major participants are in the overall music  
13 industry.

14 A. Yeah. I think, you know, back to some of the examples of,  
15 you know, live venues, you know, there's a live business that  
16 supports the music industry. You know, recording studios,  
17 engineers, studio musicians.

18 Q. Okay. And I promise one last term for you to define.

19 A. Sure.

20 Q. What does the term "A&R" refer to?

21 A. A&R is artists and repertoire. It's the area of our  
22 company that focuses primarily on the creative side of the  
23 artist relationship.

24 Q. So could you expand on what you mean by A&R involves the  
25 creative side.

1 A. Yeah. So royalties are the term that is used to designate  
2 the payment that is made from the record company to the artist.  
3 It's usually based on a contractual relationship between the  
4 record company and the artists. And it's usually paid as a  
5 percentage of the revenues that are collected on behalf of that  
6 artist.

7 Q. Are copyrights among the core assets of record companies?

8 A. Copyrights ultimately are absolutely the core asset of the  
9 company. They are the music. They are the thing that protects  
10 the music, that allows us to enforce that protection, and  
11 ultimately it is what we are monetizing and commercially  
12 delivering in the marketplace that generates revenue for the  
13 company and for the artist.

14 Q. What relationship, if any, is there between protection of  
15 copyright and the royalties that artists obtain?

16 A. I think they go hand in hand. If there is no protection  
17 of the copyright, then ultimately no one is -- there is no  
18 remuneration, there is no payment being made, and ultimately  
19 the artist is not able to get paid a royalty.

20 Q. Sure. Let's talk a little bit about how record companies  
21 generally make money for themselves and the artists.

22 A. Sure.

23 Q. Could you explain how that has worked historically.

24 A. Yes. So historically, you know, all the way back to the  
25 '50s and '60s, you know -- and the business has gone through a

1 lot of change in how you actually generate revenue and make  
2 money. But it was a 45s business. It was a singles business  
3 on vinyl which eventually moved to LPs, eight-tracks, if any of  
4 us remember that, to cassettes, to CDs, to digital downloads,  
5 and now to streaming.

6 And so, you know, there has been a lot of different  
7 ways to legally obtain music throughout the years. And that  
8 has changed dramatically from the way that consumers actually  
9 listen to and experience music.

10 But all of those different components, even today,  
11 other than maybe eight-tracks and cassettes, still make up, you  
12 know, how we make money in the business, including vinyl.

13 Q. And you referred to downloads. How are sound recordings  
14 available for sale as downloads in this era?

15 A. So they would be available in a download store, it would  
16 be a retail environment for purchase. And they typically would  
17 be available as individual tracks or also as albums.

18 Q. And for what length of time has that been the case,  
19 roughly speaking?

20 A. Roughly, early 2000s. I mean, the biggest, most prominent  
21 store that everyone recognizes is the Apple iTunes store,  
22 download store.

23 Q. I would like to explore with you now some of the costs  
24 that record companies typically incur. Can you at a high level  
25 list the more significant categories of those costs.



1 sharers in or around 2009 because it was not very good PR?

2 A. I don't know if that was the motivation. I am not sure.

3 Q. You did participate -- I think you said in your direct  
4 examination that you participated, part of a team, including  
5 the general counsel, correct?

6 A. Yes. On the leadership team, yes.

7 Q. Yes. Was there any -- do you recall having any  
8 discussions at an executive level with regard to why a decision  
9 was made not to continue to pursue individual file sharer suits  
10 after 2009?

11 A. I remember that there were conversations. And I remember  
12 that there were multiple reasons ultimately that played into  
13 that.

14 Q. But Sony just stopped after that time; is that correct?

15 A. Yes, we stopped after that time.

16 Q. Let me take you back to the 2013 and 2014 timeframe, if  
17 you can harken back to that.

18 Were digital revenues from Sony Music, including  
19 revenues from streaming services, the primary revenues that you  
20 depend on to continue in making substantial investments  
21 required to operate a recorded music company?

22 A. Sorry, could you ask the question again?

23 Q. Sure. During the timeframe 2013 and '14, did you form a  
24 belief that digital revenues of -- are and would remain the  
25 primary revenues that Sony would depend on to continue to make

1 substantial investments required to operate a recorded music  
2 company?

3 A. Digital revenues were a major component, yes.

4 Q. Okay. And that included streaming services as well,  
5 correct?

6 A. That did, yes.

7 Q. And part of it is because people just stopped buying CDs  
8 around that time, right?

9 A. Well, no, I don't think people stopped buying CDs around  
10 that time. I think CDs have been declining in sales since  
11 around 2000.

12 Q. And -- now, today the majority of the revenues for Sony  
13 Music are through streaming, streaming activities, correct?

14 A. In the U.S., that's correct.

15 Q. And did you form a belief in and around 2014 that then in  
16 the last several years you believed there was an explosion in  
17 online streaming services?

18 A. I honestly don't recall exactly where my head was at in  
19 2014.

20 Q. Okay. Do you recall forming a view that the streaming  
21 services represent the second largest component of digital  
22 music business enabling users to access millions of songs from  
23 their personal computers or mobile devices without actually --  
24 without actually buying the music?

25 A. Yeah, it was very clear that we were going through a

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VOLUME 2 (A.M. Portion)

TRIAL TRANSCRIPT

December 3, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

1 as part of a band as well?

2 A. Yes, that's correct.

3 Q. And tell us a little bit about that experience.

4 A. Well, it's a challenging art. It's a bit of magic  
5 involved in songwriting. It's a painful, creative expression  
6 at times. And as painful as it was sometimes, it was also some  
7 of the best memories I have had during that moment in time when  
8 I was creating work with my colleagues.

9 Q. So based on your own experience as a songwriter and your  
09:22:24 10 work at UMPG, can you tell us a little bit about the  
11 songwriting process in general.

12 A. Sure. As I said, it's a little bit of magic. It's kind  
13 of this magical combination of notes and rhythm and melody and  
14 lyric that comes together in a way that creates art. It's  
15 audible art.

16 Q. And how many songs does a songwriter typically write in a  
17 year?

18 A. Oh, it depends on the songwriter concerned. Some are  
19 quite prolific. Some could write hundreds of songs a year.  
09:22:58 20 Some go through a painstaking process of perhaps producing just  
21 a few noteworthy songs a year. It depends on the writer  
22 concerned.

23 Q. So the songwriter writes the song. Who typically performs  
24 the song?

25 A. At times the songwriter will also be the recording artist,

1 but much of the time the artist is different from the  
2 songwriter. So there are two distinct professions and two  
3 distinct creative works. You have the song and then the sound  
4 recording of the song.

5 Q. Can you provide an example where the songwriter is  
6 different than the recording artist?

7 A. Certainly. There is a popular song "R-e-s-p-e-c-t"  
8 performed by Aretha Franklin, which happened to be written by  
9 Otis Redding.

09:23:47 10 There are some songs in the case here, such as by  
11 Aerosmith like "Livin' on the Edge," which was written by a  
12 gentleman named Mark Hudson.

13 Also, Aerosmith "Rag Doll" was written by a gentleman  
14 named Jim Vallance.

15 There is also another song subject to this case,  
16 "Life is a Highway," which was performed by Rascal Flatts,  
17 which was written by a gentleman named Tom Cochrane.

18 So there are lots of examples where -- including  
19 songs subject to this case, where the songwriter is a distinct  
09:24:23 20 entity or person from who is performing the song.

21 Q. And "Life is a Highway," there are actually two recording  
22 artists for that song; is that right?

23 A. Well, multiple, actually, because it was covered several  
24 times. It was originally written and performed by Tom Cochrane  
25 back in the maybe late '80s, early '90s, and then was covered

1 multiple times by different artists, including Rascal Flatts  
2 more recently for the movie "Cars."

3 Q. Can you provide an example where the songwriter is also  
4 the recording artist?

5 A. Certainly. We have many, as I said, writers who are also  
6 the artists. Billy Joel tends to write his own material. One  
7 of the songs subject to this case is "I Go to Extremes" by  
8 Billy Joel both as the performer and the songwriter.

9 "Lose Yourself" by Eminem is also subject to this  
09:25:19 10 case. He co-wrote that song and performed it.

11 I could go on if you would like.

12 Q. All right. Well, thank you. Let's turn now to music  
13 publishers and their role in the creation and development of  
14 songs and songwriters.

15 Mr. Kokakis, what does a music publisher do?

16 A. We help to manage the careers of the songwriters. We give  
17 them guidance in terms of their career paths. We help manage  
18 the creative works that they create by finding opportunities to  
19 exploit them, by going out and collecting money generated from  
09:25:54 20 those works, and by protecting the rights of the songwriters.

21 Q. Can you tell us a little bit more about the creative  
22 support that music publishers provide to songwriters?

23 A. Certainly. Well, I'll speak to Universal and what we've  
24 created. We have hundreds of employees who work in the  
25 creative department who do nothing but liaise on a daily basis

1 with the songwriters who we represent. Again, giving them  
2 creative support, setting up studio sessions for them,  
3 co-writing opportunities with other writers, discussing career  
4 path, discussing opportunities to place their songs in film and  
5 TV projects and commercial advertisements, things of that  
6 nature. Anything that a songwriter needs to help create the  
7 art that winds up being brought to the public.

8 Q. And where do the record companies fit into this process?

9 A. Well, the record companies play a critical role in the  
09:26:51 10 ecosystem, but a very different role. The record companies  
11 record the songs. They record the music that winds up being  
12 publicly distributed. They represent the records and the  
13 artists. Publishers represent the songwriters and the songs.

14 Q. How do music publishers help songwriters make a living  
15 from their songs?

16 A. Well, as I mentioned, we look for opportunities to help  
17 commercially exploit the songs that are delivered to us by  
18 looking for licensing opportunities, by looking for artists to  
19 record the songs. Licensing opportunities could take the form  
09:27:28 20 of placement in a film, placement in a TV project, in a  
21 commercial, embodiment on a record, use in merchandise like  
22 lyric t-shirts, karaoke products, things like that.

23 Q. Does that mean that a songwriter gets paid every time a  
24 song is played in a bar?

25 A. Yes. That is known as public performance. There are very

1 few exceptions for that for small, small venues. But when you  
2 hear a song in a shopping mall, in a concert venue, in a bar or  
3 a restaurant, that generates a royalty payment to the  
4 songwriter.

5 Q. I would now like to talk a little bit about more about  
6 UMPG specifically. Tell us about UMPG and its business.

7 A. Certainly. We're one of the largest music publishers in  
8 the world. We have offices in dozens of countries throughout  
9 the world. We have a roster of tens of thousands of  
09:28:27 10 songwriters, and several millions of copyrights that we  
11 represent, millions of songs.

12 Q. What are the different music genres in UMPG's catalog?

13 A. A varied genre, based -- really we touch every genre from  
14 pop, to R&B, to rock, to hip hop, to classical music, country,  
15 everything in between, and probably sub-genres that I'm not  
16 even aware of that we represent.

17 Q. Can you name a few songwriters that Universal Music  
18 Publishing Group has signed that we might recognize?

19 A. Sure. The more recognizable ones would be Barry Manilow,  
09:29:09 20 and Billy Joel, and Bruce Springsteen, and Otis Redding,  
21 Brittany Spears, Christina Aguilera, Justin Bieber, Justin  
22 Timberlake, Steppenwolf.

23 I mean, I could spend the entire day naming the list,  
24 if I could recall all of them. But it's a renowned roster of  
25 clients.



1 So that's why we have so many different companies  
2 under the single umbrella.

3 Q. Thank you.

4 Mr. Duval, you can take that down.

5 I'd like to talk about UMPG's licensing activities.  
6 What are the different types of licenses that Universal Music  
7 Publishing Group negotiates on behalf of its songwriters?

8 A. Certainly. Well, I already mentioned licenses for film  
9 and TV projects. Those are commonly known as synchronization  
09:32:36 10 licenses. We issue licenses for the use of lyrics, as I  
11 mentioned, in merchandise or in karaoke-based product, in sheet  
12 music. We issue licenses for the performance of songs in, as I  
13 mentioned, bars, restaurants, concert venues, dance studios.

14 And more commonly, we issue what's known as a  
15 mechanical license, which is for the use of a song in a sound  
16 recording.

17 Q. And what are the different types of sound recordings that  
18 may fall under mechanical licensing?

19 A. Well, there are different media types that sound  
09:33:11 20 recordings can be exploited through. You could have vinyl.  
21 You could have -- I remember vinyl back in the day. I remember  
22 cassettes. I remember 8-tracks. Those were kind of clunky.

23 More recently, we see digital downloads. And we see  
24 streaming now, which is the preferred or more common method of  
25 distribution of sound recordings on services like Spotify and

1 Apple and Pandora and Amazon.

2 Q. Why is that license called a mechanical license?

3 A. It's called a mechanical license because it refers to the  
4 physical or mechanical embodiment of a song on a sound  
5 recording. And it dates back to many decades ago where you had  
6 mechanical piano rolls, right, the scrolls with the -- you  
7 know, with the grooves in them. And those would sit inside of  
8 a piano and turn and actually play the song. They would click  
9 the keys.

09:34:11 10 So that's how the phrase or name "mechanical royalty"  
11 came about.

12 Q. Are the licensing opportunities generated from -- like --  
13 for -- by licensings for musical compositions the same as those  
14 generated for sound recordings?

15 A. Sometimes they're the same and oftentimes they're  
16 different because they're unique rights types that are  
17 attributable to songs that aren't attributable to sound  
18 recordings.

19 For instance, the public performance of a song  
09:34:46 20 generates a royalty for the songwriter. Lyrics are unique to  
21 songs. Those licenses would bear a royalty for the songwriter,  
22 but not for the recording artist.

23 So there are some distinct areas for song royalties  
24 that don't overlap with sound recording royalties.

25 Q. We've been talking about royalties. Can you give us a

1 sense of a royalty rate for, say, downloading a song?

2 A. Certainly. It's prescribed by law under the Copyright  
3 Act. And it's something that fluctuates over time. But at the  
4 moment, the prevailing rate is 9.1 cents per song per download.

5 Q. And what portion of the royalties does a songwriter get  
6 from that royalty?

7 A. It depends on the underlying contract between the music  
8 publisher and the songwriter. But generally the songwriter  
9 will get the bulk of that money, anywhere from 90 percent down  
09:35:47 10 to perhaps 50 percent. More commonly in the 75 percent to  
11 90 percent range goes to the songwriter.

12 Q. So a dime per download. How is a songwriter supposed to  
13 make a living off of a dime per download?

14 A. Well, it's a numbers game. It's a volume game. So it's a  
15 very low margin, low cost transaction that over time adds up.  
16 It's a pennies business, even a micro pennies business these  
17 days.

18 So one of the responsibilities that we're charged  
19 with as the music publisher in representing a songwriter is to  
09:36:23 20 go out and collect all the micro pennies. And, you know, if  
21 all goes well, that adds up to something that a songwriter can  
22 make a living from.

23 Q. I'd now like to -- now that we have this background, I'd  
24 now like to turn to the UMPG musical compositions that are at  
25 issue in this case. Are you familiar with them?

1 strategies for how to enforce the rights of our songwriters and  
2 to reach out to people in those instances to try to put  
3 licenses in place or find commercial solutions or, as a last  
4 resort, to litigate when we're essentially ignored or can't  
5 come to terms with the party who has infringed.

6 Q. And from that work, do you think that peer-to-peer piracy  
7 was a problem for Universal Music Publishing Group in the years  
8 2013 and 2014?

9 A. Undoubtedly. It was a problem for the entire music  
09:41:23 10 industry. And, yes, Universal felt pain during that time, as  
11 did all of our clients.

12 Q. Why was it a problem?

13 A. It was a problem because you, essentially, had platforms  
14 that allowed for the consumption of music without there being  
15 any payment for that. It's like I just had the lovely  
16 experience of going to WalMart on Black Friday, and if people  
17 can envision what that experience is like, imagine if  
18 everything was actually free and you could just run through the  
19 store, you know, and take whatever you want.

09:41:58 20 That's what a peer-to-peer file sharing environment  
21 is like. It's the Wild West. It's a complete free-for-all  
22 where people's property is just stolen at will.

23 Q. And are there particular challenges associated with  
24 peer-to-peer piracy versus other types of piracy?

25 A. Well, yes, there's some unique aspects to it in that you

1 can't identify much of the time, most of the time who is  
2 actually engaging in the activity, meaning who's stealing the  
3 property. There are millions of those individuals involved or  
4 entities involved. So it's untenable to go after everybody.  
5 You just can't enforce your rights that way.

6 So the anonymity of it and the just sheer volume of  
7 it makes it very difficult to manage our rights, to enforce our  
8 rights.

9 Q. Has Universal Music Publishing Group ever tried to  
09:42:59 10 calculate its harm or losses from peer-to-peer piracy?

11 A. You know, I've been asked that in different contexts.  
12 And, you know, the example I give is that if the house is on  
13 fire, you don't stop to measure the temperature that the flame  
14 is burning at. You put the fire out, and you know it's doing  
15 damage.

16 And that's kind of what this is. It's very difficult  
17 to quantify because, again, there's anonymity. You don't know  
18 what the volume of activity is going on behind the scenes. But  
19 some things are self-evident. And this is one of those things.  
09:43:34 20 If you have property available for free or goods available for  
21 free, you know people are stealing them, you can't quite tell  
22 how many, but it's clearly doing damage.

23 So in direct response, no, we haven't run specific  
24 analyses of this, but we don't have to to know that there's  
25 damage being done.

1 decline in physical --

2 MS. NOYOLA: Objection, Your Honor.

3 THE COURT: Overruled.

4 BY MR. BUCHANAN: (Continuing)

5 Q. It says: As the decline in physical sales was offset by  
6 the growth in digital and other revenues with subscription and  
7 streaming revenues increasing by approximately 75 percent over  
8 the prior year, for the first time in 2013 yearly digital sales  
9 exceeded physical sales.

10:28:01 10 That's true, is it not?

11 A. I believe that's accurate, yes.

12 THE COURT: What year are you referring to?

13 MR. BUCHANAN: 2013, 2013.

14 THE COURT: Thank you.

15 BY MR. BUCHANAN: (Continuing)

16 Q. I would like you to turn to the next tab.

17 A. Tab 4?

18 Q. Yes. And page 24. Do you see that?

19 And it has columns 2014, 2013. It has revenue. Do  
10:28:35 20 you see that?

21 A. Yes, I see that.

22 Q. Okay. And is it correct that for the year 2014 from music  
23 publishing, the revenue went from 655 million for the prior  
24 year to 673 million just for the UMPG?

25 A. Yes, I see that.

1 Q. And that was an increase of 4 percent?

2 A. Yes.

3 Q. Okay. And this had to do with streaming, a lot of  
4 streaming happening, replacing the old type of digital sales or  
5 CD sales?

6 A. That's accurate, yes.

7 Q. Now, you said you weren't sure of the worth of Universal  
8 Music Group. Could you turn to tab 5.

9 Are you familiar with "Rolling Stone Magazine"?

10:29:25 10 A. I am, yes.

11 Q. Okay. I assume you read that. I know you have a great  
12 interest in music.

13 A. No, I don't.

14 Q. Okay. So it reports here, and tell me if this is wrong,  
15 maybe it refreshes your recollection, that UMG is worth 33.25  
16 billion?

17 A. "Rolling Stone" is not an authority on the valuation of  
18 corporations.

19 Q. So if you read that, it says: On Monday Deutsche Bank  
10:29:59 20 said in a report that it believes UMG is worth --

21 THE COURT: Stop. Sustained. The objection is  
22 sustained. You can ask him whether his recollection is  
23 refreshed by the number, but you're, again, testifying into the  
24 record on an exhibit which is not in evidence and hasn't been a  
25 foundation laid.

1 A. That's when I transitioned.

2 Q. Are there UMG companies that are plaintiffs in this case?

3 A. There are two. UMG Recordings, Inc., and Capital Records,  
4 LLC.

5 Q. And what kind of companies are those?

6 A. Those are what we traditionally call record companies that  
7 make, market, sell, get to consumers records, recorded music.

8 Q. And what is the distinction -- or can you explain the  
9 distinction between UMG Recordings and UMPG, or Universal Music  
10 Publishing Group?

11:20:04

11 A. So the Publishing Group owns, markets musical  
12 compositions, the songs themselves that are written by  
13 songwriters.

14 The record company side, UMG Recordings, Inc.,  
15 Capital Records, LLC, owns, markets the recorded music, the  
16 music you hear on the radio.

17 So Lennon and McCartney wrote the Beatles songs.  
18 Their compositions might be owned and controlled by a  
19 publishing company, which is actually not a Universal company,  
20 it's a Sony company. We own and control the Beatles  
21 recordings, the performances you hear that are embodied on  
22 records.

11:20:38

23 Q. Are UMG Recordings and UMPG ultimately owned by the same  
24 entity?

25 A. Ultimately they are owned by a parent company.



A. McMullan - Direct

221

1 Q. And what is that parent company?

2 A. The ultimate parent is called Vivendi SA.

3 Q. And does that parent company own -- strike that.

4 What entities does Vivendi SA own, that you know?

5 A. They operate a number of businesses. They operate a -- or  
6 they own a large advertising agency called Havas. A movie  
7 studio called Canal+. I think they have some video game  
8 companies. I'm not familiar with their full portfolio.

9 Q. As between UMG Recordings and UMPG, can you describe how  
10 they are structured in terms of employees and operations?

11 A. They operate separate businesses. There is a CEO of the  
12 publishing company, and it has its own legal department and  
13 artists, A&R department, or artists and repertoire department.  
14 It has its own facilities.

15 The record company side of the business operates  
16 quite a number of different record labels that each have their  
17 own CEO and marketing people and promotion people and  
18 salespeople. And that rolls up into a parent recorded music  
19 company.

11:22:27 20 Q. I am sorry, I didn't mean to interrupt you.

21 Can you describe several of the record labels that  
22 UMG owns.

23 A. Well, it now owns EMI, which is Capital Records. It owns  
24 Interscope, Decca, Verve, Republic. I mean, it owns many, many  
25 record companies.

1 unauthorized copying, distribution, exploitation of the  
2 recordings that we own and what we market and what our business  
3 is founded on.

4 Q. And are there different types of piracy?

5 A. There are different types. There have historically been  
6 different types. There was a time where piracy consisted of  
7 vinyl bootlegs of recordings. There was a time where cassette  
8 piracy, people copying albums on cassettes and selling them was  
9 the problem.

11:30:39 10 And then as with the development of the Internet,  
11 Internet piracy grew as a huge problem.

12 Q. And are you familiar with -- when you say "Internet  
13 piracy," can you describe several of the types of Internet  
14 piracy you're familiar with.

15 A. Well, there's Internet piracy where someone might just put  
16 up a website and be offering copies to directly download. And  
17 there's Internet piracy like we're talking about in this case,  
18 where there are peer-to-peer systems.

19 Q. And are peer-to-peer systems -- how do peer-to -- how does  
11:31:14 20 peer-to-peer piracy differ from the older types of piracy that  
21 you use to deal with, say, for instance, vinyl or cassettes  
22 that you were describing?

23 A. Well, in those cases someone needed to make copies of our  
24 recordings and get them one-to-one out to somebody who wanted  
25 to acquire a pirated copy.

1 Q. Let me interrupt you. When you say "one-to-one," what do  
2 you mean by that?

3 A. Well, like a copy would be made in a factory or somewhere  
4 and it had to get into someone's hand. With Internet piracy,  
5 peer-to-peer piracy, unlimited copies can be generated and  
6 distributed across the Internet.

7 Q. Can you describe, at a consumer level, how peer-to-peer  
8 piracy works?

9 A. So if -- well, at a user level, someone might have a copy  
11:32:07 10 of the recording on their computer, on their hard drive, as  
11 well as software that allows them to connect into a  
12 peer-to-peer system. And it allows them to distribute a copy  
13 of that recording to anyone else who has that peer-to-peer  
14 software client installed and connected to that system.

15 So that user can upload it into a system where  
16 millions of people can have illegal access to the recording.

17 Q. When -- strike that.

18 I think you said earlier that the business of UMG is  
19 to sell recordings; is that right?

11:32:52 20 A. Yeah, to sell, distribute, license, market recordings.

21 Q. When UMG sells recordings through a service like iTunes or  
22 Amazon, what rights does UMG give the consumer to distribute  
23 the recordings on a peer-to-peer service?

24 A. The consumer gets no rights to do that.

25 Q. Why not?

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

-----: :  
: :  
SONY MUSIC ENTERTAINMENT, et al., :  
Plaintiffs, :  
: :  
-vs- : Case No. 1:18-cv-950  
: :  
COX COMMUNICATIONS, INC., et al., :  
Defendants. :  
: :  
-----:

VOLUME 3 (A.M. Portion)

TRIAL TRANSCRIPT

December 4, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

1 Was that correct?

2 A. That is correct.

3 Q. Which specific peer-to-peer networks was MarkMonitor  
4 trying to detect the sharing of music files on?

5 A. There are four particular networks that MarkMonitor was  
6 monitoring. Those are BitTorrent, Ares, eDonkey, and  
7 Gnutella, G-n-u-t-e-l-l-a.

8 Q. Thank you.

9 And in the course of your work in this matter, did  
10 you have the opportunity to review the MarkMonitor system that  
11 was used to detect the sharing of these music files and report  
12 that to Cox?

13 A. Yes, I did.

14 Q. And at a high level, what did your review consist of?

15 A. I reviewed the source code for those systems, that is to  
16 say, the human readable form of their computer programs. I  
17 also had the opportunity to interview MarkMonitor engineers,  
18 and I was provided some documents that gave me some background  
19 about the systems in anticipation of those reviews.

20 I also reviewed evidence that is produced or  
21 collected by those systems, that is to say, the  
22 contemporaneous records that those systems generate as they go  
23 about their business.

24 Q. And is that a complete recitation of everything you've  
25 looked at, or is that just a summary?

1 A. That's just a summary. There was a lot of material. You  
2 know, I've also seen deposition transcripts from some of --  
3 and declarations from some of the MarkMonitor personnel and  
4 other personnel who were involved in software used in these  
5 systems.

6 Q. And you mentioned, I believe you said you spoke with  
7 MarkMonitor engineering employees. Was that correct?

8 A. Yes, with some of their engineers.

9 Q. Did you speak with anyone else at MarkMonitor?

10 A. There were two specific individuals, Sam Bahun and a  
11 gentleman whose last name I'm sure I will mangle with a  
12 Russian last name.

13 Q. That's okay. And, I'm sorry, I know you mentioned source  
14 code and you gave a bit of a short description of what that  
15 is, but could you please give the jury a little more of an  
16 understanding of what source code is?

17 A. Sure. When programmers write a program, they do so in a  
18 computer language that's designed specifically to facilitate  
19 giving that instruction to the computer, and it's an  
20 artificial language, but it has a syntax and verbs and nouns  
21 you create and data structures, and you write out the  
22 instructions that the computer is to perform. Those then get  
23 translated into the form that the computer actually uses.

24 Q. And are you familiar with the name Audible Magic?

25 A. I am.

1 Q. And did you come to any conclusions about the Audible  
2 Magic system? Just a yes or no question.

3 A. Yes, yes.

4 Q. And are you prepared to discuss those today?

5 A. I am.

6 Q. Thank you.

7 And did you come to conclusions with respect to the  
8 overall MarkMonitor system?

9 A. Yes, I did.

10 Q. And are you prepared to discuss those today?

11 A. Yes, I am.

12 Q. At a high level, what was your conclusions about the  
13 MarkMonitor system, including the Audible Magic system used as  
14 part of it?

15 A. Based on the evidence I've reviewed and examined, it's my  
16 opinion that that system both accurately detects acts of  
17 copying and distribution on the internet on these peer-to-peer  
18 systems, and it also provides and produces accurate notices  
19 that can be sent to an ISP like Cox to notify them of that  
20 activity.

21 Q. Thank you.

22 Ms. Frederiksen-Cross, were you in the courtroom on  
23 Monday for the parties' opening statements?

24 A. I was, Counsel.

25 Q. And did you hear Cox's counsel argue that, in very stark

1 Q. And is there a common technique upon which these  
2 peer-to-peer file sharing systems each rely?

3 A. Well, they have several common characteristics.  
4 Obviously, they're all designed to operate on the internet, so  
5 they all rely on internet connections to be able to carry out  
6 the distribution. They also all rely very heavily on a  
7 technique called hashing for file identification and for  
8 authentication of content.

9 Q. Could you elaborate on what hashing is?

10 A. Yeah. I think if we go to the next slide, I'd like to  
11 introduce an icon here that I'll be using throughout too.  
12 This little fingerprint icon is going to be used when I talk  
13 about hashing, just to help to remind you about that, but  
14 hashing is a technique -- or a hash is a technique that was  
15 developed by the U.S. government. It's based on a specific  
16 calculation of the file's contents, and it uniquely identifies  
17 what a file's contents are.

18 So if you have a hash that you have gotten from one  
19 file and you see that hash again, you know that the file --  
20 the second file with that same hash has got the same contents.

21 Q. And if you could turn your attention back to the image on  
22 this, on this slide, it looks like there's a fingerprint with  
23 a little icon in the lower right. What is that depicting?

24 A. This is the hash that represents a particular file. So I  
25 have combined the fingerprint, because sometimes these are



1 0 percent, and others might have some other number of pieces.

2 Q. Okay. So in this example, does the empty -- the user  
3 connected through Cox, is the idea that that user doesn't have  
4 anything at that point?

5 A. That's right.

6 Q. Okay. Okay. And then so what happens when the user has  
7 the software on their computer and opens up a torrent file?

8 A. The computer -- the user's computer will go out and do  
9 what's called a handshake with each of these peers on this  
10 forum so that, you know, do you have this file?

11 Yeah, I have this file.

12 And then they will begin exchanging pieces of the  
13 file.

14 So if you could click here and watch the -- watch  
15 what happens in the box on the computer. You see that as it  
16 collects those pieces, it very quickly is able to collect and  
17 assemble all of the pieces, and at the same time, the peers on  
18 the other side are also exchanging pieces with each other so  
19 that they can all build complete copies of that file as well.

20 Q. And then what happens?

21 A. Well, once the, the, all of the pieces are collected, the  
22 torrent file allows them to be reassembled in the proper  
23 sequence so that the music can be played by the user.

24 Q. And does the user have to do anything to put those pieces  
25 together?

1 A. No, no. That all happens automatically, just like the  
2 distribution. You know, as soon as a user computer gets a  
3 piece, it can be sharing that piece with others, and as soon  
4 as it gets all the pieces, a little icon pops up that that  
5 song is fully assembled, and you can play it now.

6 Q. And I see a reference on the slide to a peer swarm. What  
7 does that refer to?

8 A. Well, this -- there's only so much room on a slide. You  
9 know, I showed four peers here. A typical swarm is larger  
10 than that, and the actual number of computers that might be  
11 trading in a particular piece of music at a particular time  
12 can be in the tens of thousands.

13 Q. I see. And you -- this slide depicts -- now it depicts  
14 more computers.

15 A. A few more joined the swarm.

16 Q. And do you have an understanding about the number of  
17 users that are on the BitTorrent network?

18 A. The most recent reputable study I found was by IEEE, and  
19 it's a few years old. It indicates that at any one point in  
20 time, there'll be between maybe 15 and 27 million peers  
21 exchanging content on the internet, and it's -- that's at any  
22 one point in time.

23 Q. Is there an official place one can go to see exact  
24 measurements of how many users there are on the BitTorrent  
25 network?

1 A. No, there is not.

2 Q. And why is that?

3 A. Well, the communication for any of these computers -- any  
4 of the peers is between the peers, and some of these  
5 peer-to-peer systems use a tracker, so if you were to put a  
6 test tracker up with the right monitoring stuff, you could see  
7 the transactions maybe that were going to that tracker, but  
8 you still couldn't see everything else that was going on in  
9 the network.

10 Q. So, so there's nowhere you can go to see the number of  
11 users on the network overall; is that correct?

12 A. That's correct. By design, these systems are extremely  
13 robust and these machines talk directly to each other without  
14 central control.

15 Q. What about if I went to the Cox user that downloaded and  
16 is then distributing files to others? Could I uncover the  
17 number of times that Cox user distributed files from a review?

18 A. Not in any practical way, no.

19 Q. What do you mean by that?

20 A. Well, if you just went to a user's computer and inspected  
21 it forensically, you might have some evidence of their  
22 activity, but you would not have evidence of all of their  
23 activity.

24 Q. Let me ask you --

25 A. And you would, you would have to actually do a forensic

1 examination of that machine to get any information.

2 Q. Let me ask it to you this way: Are logs kept with --  
3 from the software otherwise of the number of times that user  
4 distributes a file?

5 A. No.

6 Q. Okay. Can you explain a little bit about the other three  
7 peer-to-peer networks that were identified in MarkMonitor's  
8 infringement notices to Cox?

9 A. Sure. Can we go on to the next slide?

10 Q. Okay. And so these are the other three? Is that the  
11 Ares logo?

12 A. Yes, Ares, Gnutella, and eDonkey.

13 Q. Okay. And I see again the, the file hash value image  
14 we're using. Why is that there?

15 A. Again, all of these systems rely on hash to authenticate  
16 and identify files. That's a really important technology.  
17 That's one of the foundation technologies of these systems.

18 Q. And there's a bunch of icons under file types. What is  
19 that meant to convey?

20 A. Again, these networks can be used to distribute any kind  
21 of file. Anything that's in an electronic form can be  
22 transmitted on BitTorrent, so electronic books, movies, music,  
23 if I want to send a video of my dog chasing her tail, any of  
24 that can be distributed on the -- using BitTorrent across the  
25 internet to others.

1 Q. Sure. And why is there the internet cloud on this, this  
2 slide?

3 A. They all rely on the internet for connection to each  
4 other, for the peers to be able to connect to each other and  
5 to be able to search for music, to download music, and to  
6 distribute copies of music.

7 Q. What, what happens if, if the peer that's downloading and  
8 distributing the music file is disconnected from the internet?  
9 Can they still engage in that, that activity at that moment?

10 A. No. When a peer is disconnected from the internet, it  
11 can neither send nor receive files from any other computer on  
12 the -- across the internet.

13 Q. And did you when you were listening to Cox's counsel's  
14 opening statement see a box saying Cox has no control over the  
15 infringement?

16 A. I remember seeing that, yes.

17 Q. And, and what's your reaction to that?

18 A. I disagree, and I disagree for two reasons. One is that  
19 Cox is the only party who can take an internet -- an IP  
20 address and determine what customer was using that internet  
21 address at that point in time, so they're the only ones who  
22 can actually forward that notice to an actual customer who  
23 might be able to affect the behavior.

24 MR. BRODY: Your Honor, I have an objection.

25 THE COURT: What's your objection?

1 Q. So, Ms. Frederiksen-Cross, could these networks function  
2 without hash values being reliable?

3 A. No.

4 Q. And before we had that sidebar, what, what happens with  
5 respect to the user that's downloading or distributing if  
6 their internet access is taken away?

7 A. Then they can't download and distribute.

8 Q. Let's, let's shift gears for a moment and -- or actually  
9 not for a moment. Let's shift gears and talk about your  
10 review of the MarkMonitor system, okay?

11 A. Okay.

12 Q. So you said MarkMonitor's role was to detect infringement  
13 of -- and report it to Cox, correct?

14 A. That's correct. Cox and other subscribers, but -- or  
15 other ISPs, but in this case, Cox is the focus.

16 Q. Okay. And at a high level, would you describe what your  
17 review of the MarkMonitor system consisted of?

18 A. Sure. I reviewed the MarkMonitor source code. I  
19 reviewed evidence produced by the MarkMonitor system. I  
20 reviewed sound recordings that corresponded to the hashes of  
21 infringing content. I reviewed samples of the notices that  
22 MarkMonitor sent out and records about how many notices it had  
23 sent out, and I also reviewed records that provided -- that  
24 were drawn from MarkMonitor's records that provided  
25 information about both the songs and the Audible Magic

1 verification associated with those songs, so song files and  
2 Audible Magic verifications.

3 Q. And you -- did you speak with anybody at MarkMonitor?

4 A. I did have the opportunity, as I mentioned, to discuss  
5 the operation of the MarkMonitor system with two MarkMonitor  
6 employees, and I also had the opportunity to read their  
7 depositions and/or declarations and some of the other  
8 information that was made available to me about the system.

9 Q. Okay. Let's jump in in more detail to that MarkMonitor  
10 system. What, what are the components of that system?

11 A. If we could go to the next slide, I have the three  
12 principal components listed.

13 Q. Okay. What's the first component?

14 A. The verification module.

15 Q. And what is that?

16 A. The verification module is used to identify -- or to  
17 create a database of known infringing works, and so there's  
18 really two parts to that. One is downloading works, and then  
19 the other is confirming their content, so you know that a  
20 particular hash is associated with a file that is known to  
21 contain some of plaintiffs' -- you know, either one of  
22 plaintiffs' files or in some cases multiples of plaintiff's  
23 files.

24 Q. Sure. So you mentioned downloading the file. Where is  
25 it downloaded from?

1 it was able to find a match, what's the artist and title and  
2 album that that unknown fingerprint matched to.

3 Q. Okay. And then -- and this -- if you go back to the  
4 prior slide, once Audible Magic returns a match, is that then  
5 what gets populated in MarkMonitor's database of known  
6 infringing files?

7 A. Right. MarkMonitor updates its database to reflect that  
8 for the information that it collected when it downloaded that  
9 file to reflect that now it's been matched --

10 Q. Okay.

11 A. -- and here's who it is.

12 Q. And that's the verification process?

13 A. That's the verification process on the MarkMonitor side,  
14 yes.

15 Q. Excuse me, the verification module, right?

16 A. Yes.

17 Q. Okay. And could you explain what the collection module  
18 is, generally speaking?

19 A. Yeah. If we can go forward back to the slide we left  
20 off?

21 The collection module is the part that actually goes  
22 out to peers on these peer-to-peer networks and identifies  
23 whether or not those peers are copying and distributing the  
24 file.

25 Q. Okay. And I see two hands have -- doing a handshake in



1 the middle there. What is that depicting?

2 A. Well, for BitTorrent, that's actually what it's called, a  
3 handshake, but it's -- for instance, if I'm on a machine -- on  
4 a computer and I'm interacting with a swarm of peers, I make a  
5 handshake with each computer in that swarm where I say this is  
6 what I'm looking for, and they can respond back whether they  
7 have it and how much they have and which pieces they have, and  
8 so that's, that's what that handshake represents.

9 Q. So --

10 A. It's the beginning of the download process really, but no  
11 content has actually been -- no actual music content has been  
12 transferred yet.

13 Q. So what's the significance of a handshake being between  
14 the MarkMonitor computer and the Cox user computer here in  
15 this slide?

16 A. Well, again, the MarkMonitor collection agent behaves  
17 exactly like any other peer except that it's creating these  
18 evidentiary records with respect to reaching out to peers,  
19 making a handshake with the peers, getting information about  
20 what the peers have. So the, the MarkMonitor collection agent  
21 is shaking hands with a Cox peer in this, in this slide.

22 Q. And in this slide, could you just -- so it says -- walk  
23 us through what's happening in the left bubble off of  
24 MarkMonitor, please.

25 A. Okay. So once the MarkMonitor system connects to that

1 specific peer, that's essentially the commencement of a  
2 download process, and so certain information is exchanged back  
3 and forth between the MarkMonitor system and a peer at that  
4 time, and the purpose of this exchange of information is to  
5 verify that the peer is online, actively running a BitTorrent  
6 client or one of the other clients that we've discussed,  
7 actively responding to requests for a particular hash value  
8 that has been verified to have known content that is some of  
9 plaintiffs' copyrighted works.

10 And then, you know, because this is, is using the  
11 hash which is what the BitTorrent system itself uses, at that  
12 point, instead of downloading content, it breaks off the  
13 connection because there's no need to -- the peer has already  
14 said, yes, I have the hash, I have these pieces of the hash.  
15 So at that point, the system breaks the connection and creates  
16 an evidentiary record that's -- that records that exchange of  
17 communication.

18 Q. What -- it says: Hash match (no need to re-download).

19 Why is that on your slide?

20 A. Just to remind me to point out, A, that it doesn't  
21 actually download the file, it doesn't create another copy of  
22 the file, but it has used that hash, that is, the fingerprint  
23 of the file, just as any BitTorrent client would, to say this  
24 is the file.

25 Yes, I've -- and the peer is responding, yes, I have

1 that file or I have pieces of that file.

2 Q. And when you say re-download it, is that because in the  
3 -- one step earlier in the verification module, MarkMonitor  
4 already downloaded a file that has that hash?

5 A. That's correct, yes. It's a known hash here, so there's  
6 no need to download it.

7 THE COURT: Can we stop here for our morning break?  
8 Does that work?

9 MR. ZEBRAK: Of course, Your Honor.

10 THE COURT: All right.

11 MR. ZEBRAK: We don't have that much more.

12 THE COURT: Okay. Then let's take 15 minutes.  
13 We'll come back and continue the testimony. Thank you.  
14 You're excused.

15 NOTE: At this point, the jury leaves the courtroom;  
16 whereupon, the case continues as follows:

17 JURY OUT

18 THE COURT: All right. Anything before we break?

19 MR. ZEBRAK: No, Your Honor.

20 THE COURT: Okay. All right. Let's take 15 minutes  
21 then. We're in recess.

22 NOTE: At this point, a recess is taken; at the  
23 conclusion of which the case continues in the absence of the  
24 jury as follows:

25 JURY OUT

1 and notified Cox, how that worked with regard to the actual  
2 e-mail?

3 A. Sure. The MarkMonitor system reads the data. It  
4 prepares the e-mail. That e-mail then gets sent to the ISP,  
5 in this case Cox. It does that by looking up the IP address  
6 and saying, oh, this is the ISP that administers that  
7 particular IP address.

8 And the e-mail addresses that I show here on the  
9 left, antipiracy2@riaa.com, is where -- is the sender identity  
10 in that e-mail, and abuse@cox.net is the recipient, and that  
11 is an e-mail address that Cox publishes to the world. It's  
12 that if you have a complaint about, for instance, copyright,  
13 this is who you're supposed to e-mail to.

14 Q. Sure. And could you explain to the jury what you have on  
15 the right side of this slide?

16 A. Yeah. I think I alluded a moment ago that there are some  
17 other tests that are made before a notice is sent out in order  
18 to ensure the currency of the notice and to send the most  
19 relevant notices.

20 So the file has been verified as infringing before  
21 the detection process, the evidence collection process ever  
22 can be used to send a notice. So if a file hasn't been  
23 confirmed to contain infringing content, that, that evidence  
24 package is not eligible to send a notice.

25 Then the, the system also tests -- remember I said

1 that the size information gets used later. The system looks  
2 at the size of the file and the size that's passed back from  
3 the peer, and if the file isn't at least 90 percent complete,  
4 if the peer is not advertising that it has at least 90 percent  
5 of the file to share, then no notice is sent.

6 Also, just to make sure that the information is  
7 current enough that Cox and ultimately hopefully the recipient  
8 will take action upon it, it only produces notices if the  
9 actual detection occurred within the last 48 hours of when the  
10 e-mail preparing notice ran. So it doesn't send notices on  
11 things that are months old. It has to be within the last 48  
12 hours.

13 And then finally, if the IP address that was  
14 captured during the interaction with the peer can't be looked  
15 up for some reason to figure out who the ISP is, then  
16 obviously no notice would be sent because you don't know who  
17 to send it to. So Cox only gets the notices that are related  
18 to Cox customers, and other ISPs would get the notices related  
19 to their customers.

20 Q. And is this slide a complete depiction of every nuance of  
21 the notification process?

22 A. No. There are other, other checks and requirements that  
23 the system goes through as well in order to, to ensure  
24 accuracy and the appropriateness of the, the message that's  
25 being sent, but I think these are probably the most important

1 ones.

2 Q. And where does the information come from that MarkMonitor  
3 includes in the infringement notice that goes to Cox reporting  
4 a Cox subscriber for infringement?

5 A. The vast majority of it comes originally from the peer  
6 and then from the evidence files where that was stored after  
7 the interaction with the peer.

8 Q. And could you explain to the jury in a little more detail  
9 what key information is included in the infringement notice  
10 from your perspective?

11 A. Yeah. The -- I mean, a lot of the really important  
12 things for the ISP to be able to process this notice or for  
13 the consumer who receives it, assuming it's forwarded, to be  
14 able to understand it and how it relates to their computer  
15 system is you have to have -- the notice identifies the ISP  
16 based on the IP and port address, and that's also reflected,  
17 the IP and the port address are also contained in the notice.  
18 Who the ISP is, of course, is a part of the notice because  
19 it's who the e-mail is sent to.

20 The infringing file by name and by the file hash  
21 that was detected, so if it's a torrent hash or the other --  
22 one of the things I didn't mention about the other  
23 peer-to-peers is at this point in time that's relevant for the  
24 litigation, they were exchanging whole files, so it would be  
25 the hash associated with that file.

1           A sample track infringe -- so -- and by sample  
2 track, I mean if the torrent was an entire album that maybe  
3 had ten tracks on it, it wouldn't list all ten of them. It  
4 would just list a sample, you know, this is one of the tracks  
5 from that torrent to help the recipient of that notice  
6 understand what music was causing the problem, and the date  
7 and time of detection both so that the recipient in the notice  
8 can understand it, but also because Cox needs the date and  
9 time to be able to figure out who the consumer is, because  
10 MarkMonitor doesn't have records about who Cox's customers  
11 are. That's the part that Cox has to be able to supply in  
12 order to forward the notice.

13 Q.   And did I hear you correctly earlier that you reviewed  
14 some of the actual notices that MarkMonitor sent to Cox?

15 A.   Yes, I did.

16 Q.   And did you also say that you looked at a larger set of  
17 data about sort of the whole complete set of notices that  
18 MarkMonitor sent to Cox?

19 A.   That's correct. There were approximately a quarter  
20 million notices in the, in the set.

21 Q.   And do you have any understanding about whether  
22 MarkMonitor is able to detect the entirety of the unauthorized  
23 reproduction and distribution of, you know, the list of works  
24 that the RIAA asked it to find on peer-to-peer networks?

25 A.   That's not technically feasible to be able to capture

1 down.

2 MR. ZEBRAK: Sure. Let me --

3 THE COURT: Thank you. Go ahead.

4 BY MR. ZEBRAK:

5 Q. Well, let me rephrase the question as Your Honor  
6 suggested.

7 When MarkMonitor identifies a peer, a Cox subscriber  
8 on one of these file sharing networks with a file on their  
9 computer, is MarkMonitor able to identify whether that's a  
10 copy of a file that the peer obtained lawfully?

11 MR. BRODY: Objection, Your Honor.

12 MR. ZEBRAK: I could say it differently, Your Honor.

13 THE COURT: Yeah. Sustained.

14 MR. ZEBRAK: Sure.

15 BY MR. ZEBRAK:

16 Q. When MarkMonitor identifies a peer, a Cox subscriber on a  
17 network with a file, can it tell if the peer obtained it from  
18 another peer on the network as opposed to a legitimate source  
19 like iTunes or Amazon or something like that?

20 A. Well, in the evidence I examined, it was often the case  
21 that the -- I mean, in approximately, I think, 15 percent of  
22 the records, the peer was still collecting the evidence. So  
23 they only had part of the file, you know, 90 percent but not  
24 100 percent. So that certainly tells me that in those  
25 instances, that peer was not getting it off of Amazon.



1           And with respect to the, you know, the implication  
2           that all of these peers might have gotten something legally  
3           and then gone out there and created torrents for it  
4           presumably -- because if they got it legally, they wouldn't  
5           have a torrent -- it's kind of like saying you walk into a bar  
6           and there's a guy there with a beer in his hand. Where did he  
7           get it? Well, he probably bought it in the bar.

8           Is it possible that one of those guys or two of  
9           those guys were the ones who first created a torrent? As a  
10          hypothetical, that could be possible, but it's improbable.

11          MR. BRODY: Your Honor, I object. That's  
12          speculation.

13          THE COURT: Hold on, hold on. No, overruled. I'm  
14          going to allow her to use the example. Go ahead.

15          THE WITNESS: I'm just saying it would be extremely  
16          improbable to think that that could happen on such a massive  
17          scale, that somehow all of these people bought something and  
18          then created torrents for it so they could give it away to  
19          total strangers en masse. That's just a nonsensical  
20          interpretation of the evidence.

21          BY MR. ZEBRAK:

22          Q. And even -- let's take -- call that a nonsensical  
23          interpretation of the evidence, that somebody would -- well,  
24          let me not --

25          A. And I didn't mean any disrespect by that, but it just --

1 opinion, via the other three products.

2 I just don't think that, that there is any lack of  
3 proof that the Cox clients were participating in these file  
4 sharing networks and were providing content that based on its  
5 hash identification is plaintiffs' content.

6 Q. Sure. And for those Cox subscribers that were reported  
7 in these notices that hadn't yet obtained 100 percent of the  
8 file, I think you said there were about 15 percent of them  
9 that had somewhere between 90 to 100 percent of the file; is  
10 that correct?

11 A. Yes.

12 Q. What were -- what's your understanding, if any, of what  
13 those peers were engaged in at that time of detection?

14 A. Well, I'm sure that they were probably distributing as  
15 well as copying, but for at least some of them, when I went  
16 through the evidence records, I could see that over time, the  
17 amount of the file that they had moved from less than 100  
18 percent when it was detected on one detection to later moving  
19 to 100 percent of the file. So I know for a fact that they  
20 were downloading copies.

21 Q. Sure.

22 A. And because of the tit-for-tat way that BitTorrent works,  
23 it's almost impossible to conceive that they were not also  
24 uploading those copies to others.

25 Q. What do you mean by the tit-for-tat way of BitTorrent?

1 A. BitTorrent and the other three protocols that we  
2 discussed earlier are all designed to prioritize exchanges  
3 with peers that are, are downloading to you. So if I have ten  
4 peers asking me for content, I'm going to give content -- I'm  
5 going to download from and give content to those four peers or  
6 three peers that are giving me the best content exchange  
7 possible. So I'm uploading as well as downloading.

8 And if you're not also uploading, the tit-for-tat  
9 system kind of puts you at the back of the line, and although  
10 it's still possible to get content if you're not uploading,  
11 it's not the way these systems are designed to work, it's not  
12 the way the protocols are designed to work. All of them have  
13 built into them this notion of exchange, that it's two peers  
14 exchanging content.

15 Q. Thank you. I'd like to turn your attention now to the  
16 Cox CATS system, okay?

17 A. Okay.

18 Q. You said you had an opportunity to review the CATS system  
19 in your work in this case?

20 A. Yes, I have.

21 Q. Okay. And at a high level, what did your review involve?

22 A. It involved, again, looking at the source code of the Cox  
23 CATS system, some of the configuration data related to how  
24 that system was set up to operate. I looked at copies of some  
25 of the policies that the CATS system was intended to implement

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
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SONY MUSIC ENTERTAINMENT, et al., :  
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VOLUME 3 (P.M. Portion)

TRIAL TRANSCRIPT

December 4, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

1 A. Over the course of that time, it's in the millions.

2 Q. And have you ever had occasion to see Audible Magic  
3 misidentify a recording?

4 A. No, never a single one misidentified.

5 Q. So what happens after you get a confirmation that a file  
6 is infringing?

7 A. So once it's confirmed that it's infringing, then we move  
8 on to the third step in this diagram here where we collect  
9 evidence.

16:50:21 10 And what's involved there is we actually connect --  
11 we establish a full connection with every peer who is involved  
12 in the swarm to collect that evidence about the file that  
13 they've distributing.

14 Q. And where do you collect that evidence to?

15 A. Into our system, yeah.

16 Q. And what is the process of collecting the evidence? Can  
17 you describe that.

18 A. Sure. So after the file has been verified as infringing  
19 and we're monitoring the swarm, we see peers, in some cases  
16:51:02 20 peers that are already actively distributing the swarm. Our  
21 system will sit and monitor that so we can see as new peers  
22 enter.

23 And as new peers are discovered, our system will  
24 establish a full connection with that peer. That connection  
25 allows us to kind of communicate back and forth through the

1 specified process that the peer-to-peer network has  
2 established.

3 Each of those communication steps are logged in the  
4 evidence that we store for that instance of infringement.

5 Q. If you don't connect to a peer, can you see what a peer on  
6 the swarm is doing?

7 A. Can you clarify? Sorry.

8 Q. I think you testified that when a peer comes into the  
9 swarm, you connect to them, and so you can exchange

16:52:01 10 information. Are you able to see what one peer is doing with  
11 another peer if you're not connected to them?

12 A. No.

13 Q. And why is that?

14 A. It's the design of the protocols. So we can have full  
15 visibility into what the peer is doing if we are connected  
16 directly to them, but we don't have visibility of their  
17 communication with other peers.

18 Q. And what is it that -- the process of connecting to the  
19 peer that you engage in, what is that called?

16:52:36 20 A. Oftentimes we call it the handshake.

21 Q. And what is the handshake?

22 A. So it's essentially a process, you can think of it as a  
23 digital handshake where there's an exchange of certain messages  
24 from our side and from the other peer's side, and kind of that  
25 mutual exchange of messages is what we refer to as the

1 handshake.

2 And part of those messages, there's some key data  
3 that's exchanged. The peer confirms to us what file. Based on  
4 the unique file identifier, it's called a hash. They give us  
5 that hash. They also tell us how much of the file they have  
6 and are distributing in the swarm.

7 Q. Does MarkMonitor actually download the infringing file  
8 from that peer?

9 A. No. At that point, it's not necessary.

16:53:34 10 Q. Why not?

11 A. Well, we've already downloaded the file in its entirety  
12 when we initially found it. So we know what the file is, and  
13 we have the unique file identifier that guarantees what that  
14 file is. It's unique to that specific file.

15 And so, when we communicate with the peer, they tell  
16 us what they have, which confirms the file, and they tell us  
17 what they're distributing. So there's no need to go further  
18 than that when they've confirmed it.

19 Q. Okay. So what happens after MarkMonitor collects  
16:54:11 20 information about a peer's distribution and stores it?

21 A. So after we collect that information, the collection of  
22 all of that data is packaged up and certain elements of the  
23 data are then inserted into what we call a notice. You can  
24 think of it as an e-mail.

25 We put that information into the notice, and then the

1 any. But the majority of the ones we were unable to produce  
2 were from 2012.

3 Q. Can we, please, look at PX-17. Publish that, please.

4 It may be -- unless you recognize it from this, I  
5 will ask Mr. Duval to open one of these folders.

6 Do you recognize this directory?

7 A. Yeah, if you could open one --

8 Q. Open one of the folders?

9 A. Yeah.

17:26:24 10 Q. And maybe open one of those.

11 A. Yes. Okay. Yes, I recognize it.

12 Q. What is this exhibit?

13 A. So these are copies of all of the notices -- excuse me,  
14 all of the notices that were sent to Cox Communications.

15 Q. And do you know roughly the time frame for the notices  
16 that were sent in this directory?

17 A. Yes. I believe it -- excuse me, I believe it was January  
18 of 2012 through March of 2015.

19 Q. And I want to look at just one of these notices, please.

17:27:08 20 And we have one up. Great. Can we zoom in on just the top  
21 piece there that says -- above: Begin PGP sign message.

22 Can you just describe what this portion of the notice  
23 is.

24 A. Yeah, I'm sorry. You said the top section here?

25 Q. Yeah, just the top section.



1 A. So the -- yeah. The way we store these, the top section  
2 that kind of is above the: Begin PGP sign message where the  
3 dashes are, is actually the message header. So this is just --  
4 we store the information about the message when it was sent.  
5 So --

6 Q. And then below that, the -- with: Dear sir.

7 A. Yeah, so that's --

8 Q. Sir or madam. Sorry.

9 A. Yeah, that portion is what we call the body of the notice.  
10 It's the actual e-mail that was sent to Cox.

17:28:02

11 Q. And who would have drafted that language?

12 A. This would have been an approved notice template that we  
13 got from the RIAA.

14 Q. Okay. And can we just scroll down a little, please.

15 So this is the notice that would have gone to Cox?

16 A. Yes.

17 Q. Okay. Keep scrolling, please. Okay.

18 And can you go to the bottom part of the notice,  
19 please.

17:28:36

20 All right. From List of Infringing Content down, do  
21 you see that? Can you describe what that is, please.

22 A. Yes. In between kind of the rows of dashes there, that's  
23 where we list out the infringement or the infringing content  
24 that we identified related to this specific notice.

25 Q. So it says: Infringing work, "No Love." What is that?

1 A. That would be the -- or infringing work -- "No Love" is  
2 the name of the song in this case.

3 Q. Okay. And what is File Name?

4 A. The file name is the actual name of the file that we found  
5 on the peer-to-peer network.

6 Q. Okay. And what is First Found and Last Found? What does  
7 that mean, excuse me?

8 A. The first found and last found are specific timestamps --  
9 previously in the logs, I think it was called initiated and  
10 completed. But these are essentially start and stop time  
11 periods of when we saw the peer distributing in this particular  
12 infringement.

13 It's meant to give the ISP a marker so that they can  
14 use it to look up the subscriber that was using this IP during  
15 that window of time.

16 Q. All right. I think we know what File Size is.

17 What is the IP Address?

18 A. So this is the IP address. And just below it the port  
19 specific to the peer that we observed infringing here.

17:30:12 20 Q. And the network in this case?

21 A. Gnutella.

22 Q. So the information contained within this, where does that  
23 come from?

24 A. This comes directly from the log files that we went  
25 through. So this is the -- essentially the infringement

UNITED STATES DISTRICT COURT  
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Alexandria Division

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VOLUME 4 (P.M. Portion)

TRIAL TRANSCRIPT

December 5, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

1 subscribers.

2           The pie chart depicts that -- those numbers expressed  
3 as percents. So 95 percent of the subscribers were  
4 residential, and 5 percent were business.

5 Q. And, Dr. McCabe, what is the source of the data records  
6 you used to assess the breakdown of the Cox subscribers who  
7 were the subject of MarkMonitor's notices?

8 A. Could we go back to the slide that has the datasets on it?

9 Q. Sure. That would be -- please let me know when I'm there.

10 A. Yeah, that's fine. So it's along the top. So it's Cox  
11 data, and it's the third file, which is -- in this display is  
12 called billing information. So billing information is the  
13 connector for the defining residential versus business.

14 Q. I'm going to, if it's okay, bring us back to the slide we  
15 were just on. Is there anything else about this slide that --

16 A. I think that's it. 95 percent versus 5 percent, yeah.

17 Q. Okay. And would you please explain to the jury what's  
18 being depicted in this slide with respect to your repeat  
19 offender analysis?

20 A. Yes. So here I looked at the -- excuse me -- I looked at  
21 the, the source of the, of the notice. So the notices that I  
22 have recorded from, as infringers -- I'm sorry -- the notices  
23 from going back to MarkMonitor, for those rights holders, my  
24 understanding is they're the plaintiffs in this suit, but the  
25 Cox file also contains notices from other rights holders.

1           So basically here what I did was look again at  
2 subscribers, so it's a subscriber analysis, and  
3 17,729 subscribers had notices from other rights holders.

4           So, again, 17,729 out of 57,600, that's depicted in  
5 the pie chart as 30.8 percent. So 30.8 percent of the  
6 subscribers had notices from other rights holders.

7 Q.    So out of the 57,600 Cox subscribers reported in  
8 MarkMonitor's notices, a little less than a third of them were  
9 also the subject of notices that led to tickets as reported by  
10 the rights holders? Is that what you're saying?

11 A.    That's correct.

12 Q.    Okay. And is this also based on Cox's records, the ticket  
13 data that you described earlier?

14 A.    That's correct.

15 Q.    Okay. Looking at the next slide you have here, would you  
16 explain to the jury what the purpose of this slide is?

17 A.    Yeah. The purpose is to depict the analysis that I did  
18 related to claims -- or notices, sorry, notices before the  
19 claim period. So if you look at the timeline on the bottom in  
20 yellow there, the bar with arrows at the end, that's the  
21 definition of a claim period, February 1, 2013, to November 26,  
22 2014, with a caveat that there's a different start time for the  
23 one plaintiff.

24           Superimposed on that in the gray is the time frame  
25 for the Cox ticket data. So for the Cox ticket data, that

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VOLUME 5 (A.M. Portion)

TRIAL TRANSCRIPT

December 6, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

1 100 million in revenue; at 2010, was over a billion; and  
2 expected by 2016 to be over 2 billion, right?

3 A. Yes, that's what it says.

4 Q. And it was a -- so it was a growing business?

5 A. Uh-huh, yes.

6 Q. I'd like to turn to PX 178, please.

7 A. I'm sorry, what document again?

8 Q. I'm sorry, PX 178.

9 MR. OPPENHEIM: Any objection?

11:40:36 10 MR. ELKIN: No objection, Your Honor.

11 THE COURT: It's received.

12 BY MR. OPPENHEIM: (Continuing)

13 Q. Ms. Trickey, earlier we looked at an Acceptable Use  
14 Policy. That was for residential customers, right?

15 A. Yes.

16 Q. This is the Acceptable Use Policy for business customers,  
17 correct?

18 A. Yes.

19 Q. And this particular copy is as of October 1, 2012,  
11:41:03 20 correct?

21 A. Yes.

22 Q. And the -- could you read the first two sentences of this  
23 document, please.

24 A. This Acceptable Use Policy, AUP, applies to all Cox  
25 Business Internet-related services, including, without

1 limitation, services provided through WiFi, service or  
2 services. Use of any of the services shall at all times be  
3 subject to the terms and conditions of this AUP.

4 Q. And then it goes on to say that -- strike that.

5 Those first sentences say that this AUP applied to  
6 all Cox Business customers, correct?

7 A. For the Internet-related services.

8 Q. For Internet-related service, not for necessarily  
9 telephone, right, or television --

10 A. Right.

11 Q. -- or other services? But for Internet, it applied to all  
12 of Cox's business customers, right?

13 A. Yes.

14 Q. And then the next sentence says: This AUP is incorporated  
15 into any applicable agreement between Cox Business and the  
16 customer -- excuse me -- that states the AUP applies, including  
17 without limitation, any applicable commercial services  
18 agreement and retail or wholesale master services agreement;  
19 correct?

11:42:21 20 A. Yes.

21 Q. And so, this is saying that this is -- this applied even  
22 if there is another agreement that Cox might have with that  
23 customer, Cox Business may have with that customer, right?

24 A. Yeah, typically there was a customer service agreement  
25 that incorporated this document by reference.



1 Q. And the next paragraph says that if there's a conflict  
2 between those two contracts, this AUP trumps, or is in charge,  
3 or applies, right?

4 A. Yes, it says the terms of this AUP will govern.

5 Q. Govern. And by saying "will govern," that if there's a  
6 conflict between a specific agreement and the AUP, the AUP is  
7 what the customer has to follow, correct?

8 A. Yes.

9 Q. Okay. Now, in section A-1, that's much like the  
10 residential AUP, it prohibits the customer from doing anything  
11 that would -- on the Internet service that would violate  
12 federal law, correct?

13 A. Yes.

14 Q. And as before, federal law included copyright  
15 infringement, correct?

16 A. Yes.

17 Q. And then it goes on at the last sentence of that paragraph  
18 to say, that the customer also could not use the service in a  
19 manner that infringes on copyright, among other things,  
20 correct?

21 A. Yes.

22 Q. So again, just like the residential agreement, Cox  
23 Business customers were not allowed to commit copyright  
24 infringement on Cox's high-speed Internet service, in two  
25 different places it's prohibited, correct?

1 A. You mean residential and business? Is that what you mean  
2 by "two different places"?

3 Q. No.

4 A. Oh.

5 Q. In two different provisions of this agreement --

6 A. Oh, I see.

7 Q. -- say, you're not allowed to use Cox's Internet service  
8 to commit copyright infringement?

9 A. Yes.

11:44:11 10 Q. In section 5 on the next page it says, well, any reference  
11 in this agreement to customer shall also apply to any end user  
12 of the service, correct?

13 A. Yes.

14 Q. So, for example, if I run an apartment building, and I am  
15 the customer of Cox, and I've got residents in the apartment  
16 building who are end users, those end users are subject to this  
17 AUP, correct?

18 A. Yes.

19 Q. And it goes on to say that if the customer allows others  
11:44:51 20 to use the service, the customer is responsible for ensuring  
21 that the end users comply with the AUP, right?

22 A. Yeah, typically via contract.

23 Q. Right. So going back to my example, I then, if I'm  
24 managing the apartment building, would have to make sure that  
25 the residents comply with the AUP, right?

1 A. Yeah. You'd probably put it in your lease.

2 Q. Maybe that's how I'd it, right. And then it goes on and  
3 says: Customer is responsible for ensuring that all accounts,  
4 sub-accounts, and alternative account names associated with  
5 customer's principal account comply with the AUP, right?

6 A. That's what it says.

7 Q. Now, let's turn to section six of this document, please.  
8 And that's a section called Resale and Redistribution Services,  
9 correct?

11:45:54 10 A. Yes.

11 Q. So this applies in situations where Cox's customer maybe  
12 is running their own small ISP, correct?

13 A. It could be an ISP, yes.

14 Q. Right. So I might be located in -- I don't know, pick a  
15 small town somewhere, and I want to run an ISP in that town, I  
16 may enter into an agreement with Cox, Cox provides me with the  
17 ability to then sell to others in the town, right? That would  
18 be the situation?

19 A. That's one possible situation, yes.

11:46:33 20 Q. Among many situations, right?

21 A. Right.

22 Q. Okay.

23 A. Yeah, it lists a number of them in here in this paragraph.  
24 There's a lot of options.

25 Q. And the first paragraph of this, it says -- let's --

1 actually, let me skip down to -- skip down to row (vi), or  
2 romanette (vi).

3 Could you read that, please.

4 A. Customer is responsible for ensuring that all end users of  
5 the services agree to the terms and conditions of this AUP as  
6 may be amended from time to time.

7 Q. Okay. So this is, again, just like what we were reading  
8 before, that the customer is responsible for end users, where I  
9 use my apartment building as an example, this is saying the  
10 same thing applies with respect to a reseller of Cox's  
11 services, right?

12 A. Yes.

13 Q. And then it goes on and it says in the next parentheses,  
14 romanette (vii): If customer becomes aware of violation of the  
15 AUP by any of its end users, customer shall suspend the  
16 services to such end users and shall notify Cox Business in  
17 writing as soon as reasonably practicable, right?

18 A. That's what it says.

19 Q. So the first time that a customer becomes aware that one  
20 of its end users is violating the AUP, that customer must  
21 suspend the end user, right?

22 A. Well, that's what it says.

23 Q. And it uses the word "shall," right?

24 A. Yes.

25 Q. It's not discretionary, right?

1 A. I mean, that's what it says.

2 Q. There's no graduated response here, right? It's, you get  
3 caught once, you suspend?

4 A. Yeah. I don't know if the customer had their own  
5 graduated response process or procedure. I'm just going by  
6 what the document says.

7 Q. According to Cox, that customer was not allowed to have a  
8 graduated response, correct?

9 A. Okay. Yeah, I -- no, I don't know that.

11:49:04 10 Q. Well, isn't that what this provision says when it says  
11 that the customer shall suspend services to the end user?

12 MR. ELKIN: Objection.

13 THE COURT: Overruled.

14 Do you have an understanding from reviewing the words  
15 themselves? You may respond.

16 THE WITNESS: Yeah, I'm --

17 THE COURT: If you don't understand --

18 THE WITNESS: Right. I'm not sure.

19 BY MR. OPPENHEIM: (Continuing)

11:49:27 20 Q. So you were involved with the abuse group for a year as  
21 their legal counsel, and you were also responsible for the  
22 business AUP, and you're testifying that you don't understand  
23 what the legal obligations were you were imposing on the Cox  
24 Business customers? Is that your testimony?

25 A. So I know what it says, but I never actually had occasion

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VOLUME 5 (P.M. Portion)

TRIAL TRANSCRIPT

December 6, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

1 MR. BUCHANAN: Got it.

2 MR. OPPENHEIM: Tab 13.

3 MR. BUCHANAN: Show it to him?

4 MR. GOULD: No.

5 THE COURT: He is impeaching him, not trying to  
6 refresh his recollection.

7 BY MR. GOULD: (Continuing)

8 Q. Mr. Vredenburg, in your sworn -- that was in December  
9 2015 --

16:49:04 10 THE COURT: Just ask him what question he was asked  
11 and what his answer was.

12 BY MR. GOULD: (Continuing)

13 Q. Were you asked this question and did you give this answer,  
14 Mr. Vredenburg: And when you started -- excuse me -- all  
15 right. So when you started in 2004, you were a 2.0 TOC; is  
16 that correct?

17 When I started in 2004, I was 2.0 tech.

18 And when you started, there was a three-strike policy  
19 for copyright infringement notices and the customer was  
16:49:28 20 terminated; is that correct?

21 As far as I know, yes, there was a three-strike.

22 Are you changing your testimony, sir?

23 A. No, I am not changing. There was never an actual  
24 three-strike policy.

25 Q. And you recall over time Cox's graduated response was

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VOLUME 6 (A.M. Portion)

TRIAL TRANSCRIPT

December 9, 2019

Before: Liam O'Grady, USDC Judge

And a Jury



1 So brings back a lot of good memories.

2 Q. And how -- what do these sound recordings represent to  
3 Warner Music Group?

4 A. They're some of the most iconic songs in our catalog and,  
5 you know, we want to make sure they're protected.

6 Q. Have you listened to any of the infringing music files in  
7 this case?

8 A. I have.

9 Q. How many?

10:18:19 10 A. I listened to 100.

11 Q. And how were those 100 selected?

12 A. It was a random statistical sample.

13 Q. And why did you listen to a sample of the infringing music  
14 files in this case?

15 A. I wanted to make sure that I familiarized myself with what  
16 was being infringed and whether they were in fact our songs.

17 Q. And what did you conclude after listening to those files?

18 A. That they are in fact our songs listed within the exhibit.

19 Q. All right. Let's turn to the revenues generated from  
10:18:55 20 Warner Music's -- Warner Music Group's sound recordings.

21 What are the different ways that Warner Music makes  
22 money from its sound recordings?

23 A. We will sell our music in various formats to customers.  
24 And we will also license music into sound tracks, into  
25 commercials, films.

1 We will license them to competitors in some cases to  
2 put together compilations and other works.

3 It will also lead to what we call artist services and  
4 expanded rights. So those are other ancillary rights that we  
5 might have in concert promotion, in merchandise, and some other  
6 areas like that.

7 Q. You mentioned formats. What are the different types of  
8 formats that Warner Music Group sells with sound recordings?

9 A. Sure. We sell records in a physical format, so that would  
10:20:01 10 be either a compact disc or a vinyl record. They may also come  
11 in a box set. We sell it in digital formats, downloads, and  
12 streaming. We also sell it in mobile formats, ring back tones.

13 Those are the primary formats that we sell music in.

14 Q. What is Warner Music Group's view on paying its artists?

15 A. We see it as fundamental to our business. Our initial  
16 relationship is with the artist. We have to build the trust  
17 that they know that we're going to help them develop their  
18 careers and that they know that they will be -- they will be  
19 paid for the sales that we do on their behalf and our behalf.

10:20:56 20 Q. How would you react if someone said that the Warner Music  
21 Group record labels are not collection agents for their  
22 artists, but that they actually just collect money for  
23 themselves?

24 A. I would say they're misinformed and patently wrong.  
25 Fundamental to how and why we've been in business for the

1 decades that we've been in business and, you know, our  
 2 competitors in some cases longer than that, if we didn't have  
 3 the trust of our artists that they were going to get paid, then  
 4 we wouldn't be able to continue to sign and develop and attract  
 5 artists year in and year out.

6 Q. In your role as executive vice-president and chief  
 7 financial officer, are you familiar with peer-to-peer piracy?

8 A. I am.

9 Q. Has Warner Music Group been impacted by peer-to-peer  
 10:22:01 10 piracy?

11 A. We have.

12 Q. What has been that impact?

13 A. It has been -- it's been enormous and significant. In a  
 14 period of time when music consumption has risen year in and  
 15 year out, as an industry we've seen revenues decline over that  
 16 period, over a period of time from its peak to where we are  
 17 today.

18 Q. What were the consequences of this revenue decline to the  
 19 music industry as a whole?

10:22:46 20 A. Well, first and foremost, you know, artists were not  
 21 getting paid. Copyright holders weren't getting paid, as well  
 22 as union members, as well the musicians working on those  
 23 records.

24 We, as Warner Music Group, had to rationalize our  
 25 infrastructure or the labels that we had, and we've had to go

1 through at different points in time and either close labels  
2 down, merge them together.

3 Probably the clearest example I could give you would  
4 be two of our kind of founding labels of Atlantic and Elektra  
5 being merged together to rationalize their costs simply because  
6 of the revenue decline.

7 You know, Elektra is the home of artists like "The  
8 Doors" and "The Eagles" and "Anita Baker" and others like that.  
9 So we also had to lay off people just in terms of looking at  
10:23:57 10 what our revenue base could afford and what we wanted to return  
11 to our owners.

12 Q. I'd like to hand up the witness a copy of an exhibit  
13 that's been premarked as PX 486. Thank you.

14 Mr. Flott, have you seen this document before?

15 A. I have.

16 Q. And at a high level, what is this document?

17 A. It reflects the revenues of the U.S. recorded music  
18 business over a period of time.

19 Q. Where does this document come from?

10:24:39 20 A. It comes from the RIAA, which is our U.S. industry  
21 association.

22 Q. And how is it that you come across this type of document?

23 A. It is regularly published, and it's a document that I look  
24 at on a regular basis.

25 With the RIAA, we do a regularly quarterly call where

1 we go through performance. It's also on their Web site as  
2 well.

3 MS. NOYOLA: I'd like to move PX 486 into evidence.

4 THE COURT: Any objection?

5 MR. BUCHANAN: No, Your Honor.

6 THE COURT: It's received.

7 BY MS. NOYOLA: (Continuing)

8 Q. Mr. Flott, can you describe what this chart shows.

9 A. This chart is reflecting the U.S. recorded music revenues.

10:25:28 10 If I look at the left most column, that's marked as the year  
11 2000 where industry revenues were in excess of \$14 billion.

12 It continues to the right to 2014 where the revenues  
13 are just under \$7 billion.

14 Q. And is this chart specific to Warner Music Group?

15 A. No, it's the U.S. recorded music revenues.

16 Q. Tell us what these different colors on this chart show.

17 A. Each color represents a different format. So the largest  
18 color that you see on the left side of the page being orange,  
19 that's the compact disc.

10:26:15 20 And as you move to the right, you'll see other  
21 formats as they came into play. So in 2004, you start to see  
22 purple. That is the -- that's a download, and the different  
23 shades are the different forms of whether it was a single or an  
24 album.

25 And then we start to see in 2005 green start to come

1 in. And that is streaming and the different types of streaming  
2 revenues that come through.

3 Q. Are you familiar with the term "music consumption"?

4 A. Yes, I am.

5 Q. What does that term mean?

6 A. Music consumption means the number of hours that a  
7 consumer is -- generally commits to listening to music.

8 Q. And in your day-to-day work, have you become familiar with  
9 the volume of music consumption over this time frame of 2000 to  
10 2014?

10:27:19

11 A. Yes.

12 Q. And how so?

13 A. In additional reports that either I've seen come from the  
14 RIAA or other published articles, there's reference made to the  
15 number of hours that a consumer, you know, has committed and  
16 how it's grown from 2000 through to today.

17 Q. What is your understanding of the volume of music  
18 consumption from 2000 to 2014?

19 A. It has continued to increase year over year, and I think  
20 towards the end of this chart, I believe consumers are  
21 committing almost a week a year -- a week a -- sorry. A day a  
22 week to consuming music.

10:27:58

23 Q. So how does that trend of music consumption compare to the  
24 trend that's shown here about -- on recorded music revenues?

25 A. Well, in a normal business model, you would expect -- as

1 consumption grows, you would expect revenues to grow in line  
2 with it. There may be some shifts as things go, but generally  
3 the trend that we've seen with other formats as they've come in  
4 is that you've seen revenue growth, not revenue decline.

5 Q. So how do you explain the revenue decrease over this time  
6 period if music consumption is increasing over the same time  
7 period?

8 A. At this same point in time where we made the turn of the  
9 century is really when peer-to-peer piracy was starting to grow  
10:29:04 10 at just increasing rates. And peer-to-peer piracy, by its  
11 nature, is not a sale. It's actually -- it's stealing music.  
12 None of those tracks that are being shared peer-to-peer are  
13 being paid for.

14 And as a byproduct, artists, copyright holders,  
15 union, and the rest of the people within the music industry  
16 aren't being paid for those illegal transactions.

17 Q. And has Warner Music Group ever tried to calculate its  
18 harm from peer-to-peer piracy?

19 A. We've not, other than on a macro -- you know, a macro  
10:29:54 20 basis.

21 Q. And why haven't you calculated -- why haven't you been  
22 able to calculate Warner Music Group's harm?

23 A. The nature of peer-to-peer piracy is it's viral, and  
24 probably maybe the best way I can try and explain how viral it  
25 works is if we use an example of a pebble going into a pond and

1 it's starting to create ripples. It's not about the first  
2 transaction or the first infringement that takes place. Once  
3 that track gets put up on a site that can be shared, it's then  
4 shared amongst, you know, whoever wants to take it and whoever  
5 then they share it with and they share it with.

6 So if you kind of think about that initial pebble  
7 coming in, and then the next person taking it and their pebble  
8 dropping in, it creates just these multiple waves. So the  
9 viral nature of it, just trying to understand where that wave  
10 stops is -- has not been -- it's not something that we've been  
11 able to do.

12 Q. When users illegally download and distribute works on  
13 these peer-to-peer networks, how do record companies get paid?

14 A. We don't because they're stolen and they don't -- they're  
15 not paying anyone.

16 Q. And how did --

17 A. Including our artists, including our copyright holders,  
18 including, you know, all of the other people within the chains,  
19 the union musicians, the marketing people, and, you know, the  
20 artists themselves. You know, ultimately no one is getting  
21 paid from those transactions.

22 MS. NOYOLA: Thank you, Mr. Flott.

23 Pass the witness.

24 THE COURT: Cross-examination.

25 MR. BUCHANAN: Yes, Your Honor.



1 Q. And 1999 was the advent of Napster; is that correct?

2 A. In that area, yes.

3 Q. Okay. And in 2001 you had iTunes and Apple?

4 A. No, it -- iTunes started late 2003, early 2004.

5 Q. Okay. And that led to what they call the disaggregation  
6 of the album, the CD album, correct?

7 A. It created a different format.

8 Q. Right. And the format was you could now pick and choose  
9 whatever individual song you wanted, you didn't have to go buy  
10 a CD with 26 songs that cost 25 bucks; isn't that right?

11 A. If a consumer chose to do that, yes, but they still had  
12 the ability to buy music in whichever way that they wanted to.

13 Q. Right. But they could make a choice between going on to  
14 iTunes and paying a dollar for their favorite song versus going  
15 to a record store and paying \$25 for an album that had 25 songs  
16 and really only wanted one, right?

17 A. That is -- was their option, yes.

18 Q. So one of the other things that, as I understand it, that  
19 your company did to counter the loss of CD sales due to piracy  
20 and downloading was to sign artists up to what they call

21 360 deals; is that right?

22 A. That's correct.

23 Q. And they involved basically trying to find artists at the  
24 beginning of their career and then expanding the rights that  
25 your company would own vis-à-vis that artist, right?

1 revenue, but it wasn't our main strong point in looking at  
2 that.

3 Q. Mr. Zabek, isn't it in fact true that you, in this  
4 declaration in 2015, testified that when you implemented the  
5 graduated response procedure, you would keep in mind the effect  
6 on Cox's business, including the potential loss of revenue?

7 A. We would keep that in mind. We would keep it in mind.

8 Q. And you understood that when their rights were infringed,  
9 that that was a violation of federal law, right?

12:19:56 10 A. If -- I think if we could prove that, possibly with a due  
11 process, to look through their computers. But again, we've got  
12 good faith on one side, we've got good faith on the other side  
13 with the customer also, too.

14 When we would assist these customers, you know, we  
15 try to help them to see, are they using these products, you  
16 know, legitimately? Are they using it nefariously? Are they  
17 even aware of any of the issue also -- any of these issues.

18 Q. I'm handing you what's been marked as Plaintiff's  
19 Exhibit 260, which is an e-mail exchange between you and  
12:20:33 20 Terran, T-e-r-r-a-n, Williams in August of 2010. And this  
21 document is Bates labeled Cox\_Sony\_00005212.

22 Mr. Zabek, in your e-mail exchange with Ms. Williams,  
23 didn't you in fact say at the bottom of your e-mail:  
24 99 percent of DMCA violations is from people using peer-to-peer  
25 on purpose and not Trojan activity; correct?

1 A. Back then, yes, I did state that.

2 Q. And yet you also understood that Cox didn't want to lose  
3 customers over copyright violations, correct?

4 A. Well, Cox didn't want to lose customers over almost  
5 anything that we could help to avoid it if there was something  
6 that we could assist that customer with. I don't know a  
7 business that does want -- that wants to lose customers. And,  
8 no, we did not want to lose customers.

9 Q. What were the factors that the abuse department would  
10 consider in deciding whether or not to terminate a customer?

11 A. There are many. I can't -- it's been so long. Um, to  
12 give you those. A lot of things we would look at would be, you  
13 know, was -- did the customer have any violations for, again,  
14 malware. You know, any kind of proxy. Could we assist them,  
15 you know. Was there -- was there any software on the computer  
16 that they may not have been aware of that maybe somebody else  
17 put on there. Or, again, if they were enacted by a hacker and  
18 being used to actually transport that data through them also,  
19 too.

12:22:34 20 So we would look at many different -- several  
21 different factors on there too. We'd also interview, of  
22 course, the customer also, too, on that.

23 Q. You just described -- I asked you --

24 A. Yeah.

25 Q. -- what were the factors that the abuse department would

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VOLUME 6 (P.M. Portion)

TRIAL TRANSCRIPT

December 9, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

1 123,000, 109,000? Do you see that?

2 A. Yes.

3 Q. And you see that as the months continue, that the deleted  
4 notices actually exceed the number of notices that CATS  
5 accepted?

6 A. That is the case for some of the months, yes.

7 Q. Isn't it the case for all of the months there shown in  
8 2013, sir?

9 A. No, it's not.

10 Q. No, it's not? Is there one that you see where the deleted  
11 notices are smaller than the accepted notices?

12 Oh, you're right. May 2013, there were about 10,000  
13 more accepted than deleted. And the other months, the deleted  
14 exceeded the accepted, correct?

15 A. Yes. That matches what I'm seeing.

16 Q. Now, I've done the math here, and I counted the number of  
17 deleted notices in the years shown in this chart, and it's  
18 about 5 million. And is there any reason to doubt my math?

19 A. I would have to run the numbers myself to speak to that.

20 Q. Okay. And then I did the same for the claims period.

21 And if we could pull up the first slide of the  
22 demonstrative?

23 What this slide shows, sir, is the claim period,  
24 February 2013 through November 2014, for the information we  
25 just looked at, including the accepted notices, the deleted

1 notices, and the total notices.

2 Do you see that the total number of notices was about  
3 5.7, 5.8 million that Cox received in this time period?

4 A. Based on the document, yes.

5 Q. Assuming the math is correct.

6 A. That's right.

7 Q. And do you see that the number that Cox accepted was just  
8 over 2 million, and that comes to about 36 percent of that  
9 total?

10 A. I see.

11 Q. And do you see, Mr. Beck, that the number that Cox deleted  
12 is about 3.68 million, which comes to about 63 percent of the  
13 notices?

14 A. I see that.

15 Q. So according to this sworn information that Cox provided,  
16 Cox deleted over 63 percent of the infringement notices it  
17 received in 2013 and 2014, correct?

18 A. Based on the numbers we're looking at.

19 Q. And not one of those would have received a customer facing  
20 action of any kind, correct?

21 A. For the deleted notices. They may have received notices  
22 from non-blacklisted senders, however.

23 Q. Of those 3.68 million, not a single customer faced any  
24 action, correct?

25 A. For those particular notices.

UNITED STATES DISTRICT COURT  
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VOLUME 7 (A.M. Portion)

TRIAL TRANSCRIPT

December 10, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

1 ICOMS that he's shown in this column?

2 You found it? All right, let's pull it up. We found  
3 it.

4 I got it. Beautiful, thank you. It takes a village.

5 So on this third one, on the business customer, sir,  
6 this was a fraternity based on the information that Cox  
7 provided, so let's see what the fraternity did.

8 A. If we found the -- a copy, do you mind if I get the paper?

9 Q. Oh, yes. Absolutely, sir. And this is PX 549.

10 A. I appreciate it.

11 Q. So similar in kind, we've counted the number of tickets  
12 for this fraternity business customer, and it was 67 tickets,  
13 and you could figure that out by counting the unique number of  
14 ticket IDs, correct?

15 A. That can be determined by counting the ticket IDs, yes.

16 Q. Okay. So let's go to column H and filter again. Let's  
17 filter for warnings.

18 So out of 67 infringement notice tickets, if you look  
19 on the bottom left, sir, you see that it's 48 warnings to the  
20 customer?

21 A. Yes, I see.

22 Q. Okay. And then if we filter for hard limits, that would  
23 be instances where notice or tickets rejected for being over a  
24 complainant's cap, with no customer-facing notice, correct?

25 A. Yes, subject to possibly hold for more. Yes.



1 Q. Nine hard limit replies with no customer-facing action,  
2 correct?

3 A. That's what I see.

4 Q. And -- okay. If you could clear that and go back to  
5 column H, and let's look for suspensions or terminations.

6 We don't see any suspensions or terminations of the  
7 fraternity, right?

8 A. No.

9 Q. And likewise, we don't see any terminations for the  
10 fraternity?

11 A. No, we do not.

12 Q. Okay. And if we could go, unfilter again, and look the  
13 tickets range from March 2012, correct?

14 A. Starting in March 2012.

15 Q. All the way through November 2014, correct?

16 A. Yes.

17 Q. And we don't know what happened after that. We don't know  
18 what happened in 2015 because we don't have the data, right?

19 A. Correct. Yes, this report was scoped 2012, 2013, 2014.

20 Q. And so for any tickets received but they received no  
21 warning and no hard limit reply, do you know what happened to  
22 those? I think the count would be about 19.

23 A. Do we have a way to filter for those?

24 Q. We don't -- I mean, we could filter for -- on H for --  
25 well, changed status to closed would be overinclusive.

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VOLUME 7 (P.M. Portion)

TRIAL TRANSCRIPT

December 10, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

1 with a Bates number Cox\_Sony\_511291 dated June 5, 2014.

2 Do you see that either individually or as a recipient  
3 from an e-mail distribution group you are a recipient or sender  
4 of this e-mail?

5 A. Yes.

6 Q. And once again, Mr. Mathews begins an e-mail chain subject  
7 titled: Termination Review.

8 Do you see that?

9 A. Yes.

10 Q. And Mr. Mathews says: This customer is well aware of his  
11 actions and is upset that after years of doing this he is now  
12 getting caught. Customer was advised to stop sharing, check  
13 his wireless, and remove his P2P programs.

14 Did I read that correctly?

15 A. Yes.

16 Q. Can you read your response.

17 A. Please advise this customer that this is their final  
18 suspension and reactivation. If we receive one more complaint,  
19 we will regretfully not be able to provide them with data  
20 service for six months.

21 Q. Isn't this the poster child for termination, Mr. Sikes?

22 A. Yes. And if they continued after this point, they would  
23 be terminated, yes.

24 Q. So given that termination review on the 13th infringement  
25 notice, it's still not enough?

1 Q. Okay.

2 A. So these were not the final numbers.

3 Q. Okay. And if you could turn to page 4 of this same  
4 exhibit, please. This is a slide labeled Executive Summary.  
5 There is a sub-bullet that says: P2P is the most bandwidth  
6 intensive category.

7 Then it says: (13 percent of all broadband  
8 households) on average use 82 gigabytes a month, accounting for  
9 21 percent of all Internet traffic.

10 Do you see that sub-bullet?

11 A. Yes.

12 Q. Could you explain what that means?

13 A. Yeah. This means for the U.S., and a lot of our analysis  
14 was done for profiling the United States user base and then  
15 applying it to Cox.

16 So this would mean that 13 percent of all broadband  
17 households across the country engaged in P2P. And those that  
18 do, use an average of 82 gigabytes per household per month for  
19 peer-to-peer.

20 And that total then extrapolated out accounts for  
21 21 percent of all Internet traffic.

22 Q. So at the time of this Mid-Term Readout, this was 2012,  
23 correct?

24 A. Yes.

25 Q. And here you're indicating that Cox has five different

1 tiers of high-speed Internet service; is that correct?

2 Ultimate, Premier, Preferred, Essential, and Starter?

3 A. Yes.

4 Q. And is the idea that each of those tiers has a different  
5 monthly data allowance?

6 A. Yes.

7 Q. And the idea is that the more data a customer consumes,  
8 the higher the tier they need to move into unless they stop --  
9 stop the usage, correct?

10 A. Yes.

11 Q. What online activities besides streaming or downloading a  
12 video account for higher bandwidth usage than peer-to-peer?

13 A. Okay, just give me a second.

14 Okay. So if you refer to page 18 in the same  
15 document, in terms of the overall, you'll see video streaming  
16 of two different flavors, SD and HD, absorb more bandwidth.

17 So then on this slide, it would show that  
18 peer-to-peer is third. But what it doesn't show is the other,  
19 which contains many other services.

20 So those detailed breakdowns are not there.

21 Q. Okay. So after video streaming, peer-to-peer represents  
22 the category that consumes the most bandwidth usage by  
23 subscribers that engage in that activity, correct?

24 A. Yeah. I would have to look at what's in Other, right?

25 Because Other is 17 percent. So what I don't know is whether

1 peer-to-peer usage was forecasted to increase year over year?

2 A. Yes.

3 Q. And if you could turn to the High Household Profile  
4 section of this excerpt.

5 Do you see that?

6 A. Yes.

7 Q. Does this reflect that inCode forecasted to Cox that for  
8 those that engage in peer-to-peer activity, that their overall  
9 data consumption for peer-to-peer would increase in each of the  
10 years for 2011 to 2015?

11 A. Yes.

12 Q. In 2011 the Procera data showed that 12-and-a-half percent  
13 of the data of Cox's network was being used for peer-to-peer  
14 file -- file usage, correct?

15 A. Yes.

16 EXAMINATION

17 BY MS. LEIDEN:

18 Q. Could you first turn to the document that Mr. Zebrak  
19 marked earlier as Exhibit 94. That's the hard copy of the  
20 spreadsheet that you were looking at electronically.

21 A. Okay.

22 Q. Just a couple of clarifying questions on this data. If  
23 you flip to the second tab after the first blue page, the page  
24 titled Summary of Data Usage.

25 A. Yes.

UNITED STATES DISTRICT COURT  
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VOLUME 8 (A.M. Portion)

TRIAL TRANSCRIPT

December 11, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

1 A. Yeah. I mean, one of the more recent or latest -- I  
2 forget the precise date of it, reviews of the literature, but  
3 it was -- I believe it was after the 2014, said that they found  
4 26 studies of whether or not there was economic harm to rights  
5 holders, and they found that something like 23 out of those --  
6 out of the 26 studies found significant economic harm.

7 Now, when you say "significant," what you mean is  
8 that you're actually able to demonstrate it within the dataset  
9 using statistical methods to basically sort of pass muster.

09:50:52 10 So it's not like I found evidence, but it's not  
11 statistically significant. So it doesn't mean that's  
12 meaningless, it just means that, you know, it doesn't cross  
13 that higher bar that academics try and set for themselves in  
14 published literature.

15 So when they say 23 out of 26 studies found  
16 significant harm, that's -- you know, I would say, you know, a  
17 demonstration of almost universal consensus in the profession.

18 Q. And did you agree with that consensus?

19 A. Absolutely. And I think all the other evidence I  
09:51:25 20 considered in this matter just goes to confirming that.

21 Q. Have you prepared a slide excerpting one of the studies  
22 you reviewed?

23 A. Yes.

24 Q. Could you tell us about this study and why you've put this  
25 slide here, Dr. Lehr?



1 A. Yeah. This is one of the studies that I cited, and the  
2 title of the study is Quantifying Global Transfers of  
3 Copyrighted Content Using BitTorrent.

4 And it's by Alexandria Mateus and John Peha. And  
5 I've highlighted, you know, excerpts from this. So the first  
6 excerpt is that 10.7 songs were transferred using BitTorrent  
7 for every song sold.

8 And then also, that the vast majority of music and  
9 video content transferred using BitTorrent is copyrighted.

09:52:12 10 And they find that only .55 percent, less than, you  
11 know, 1 percent, about half a percent of the content in  
12 BitTorrent is not copyright infringing and potentially  
13 legitimate.

14 So they conclude that BitTorrent transfers result in  
15 hundreds of millions of copyright violations worldwide per day,  
16 and the copyright holders fail to realize significant revenues  
17 as a result.

18 What these guys did in the study was they looked in  
19 some detail and care at actually what's going on in BitTorrent  
09:52:48 20 traffic. And, you know, it's a fairly comprehensive study, I  
21 think, in doing that.

22 And what they're saying here is essentially this  
23 research says that the number of illegal copies that are out  
24 there -- because almost all these copies that are going by  
25 BitTorrent are illegal, that's what this is saying, is that

1 it's copyrighted material that are being shared over the  
2 BitTorrent network -- it's ten times what the legal sales are.

3 Q. Now, Dr. Lehr, there is a document in front of you,  
4 PX 439.

5 A. Yes.

6 Q. Do you recognize that?

7 A. Yes.

8 MR. GOULD: I'd move to admit PX 439.

9 THE COURT: Any objection?

09:53:32 10 MR. BUCHANAN: Yes, Your Honor, I would -- no  
11 objection.

12 THE COURT: All right. Your exception is noted  
13 previously.

14 MR. GOULD: If we could pull up--

15 THE COURT: The exhibit is received.

16 MR. GOULD: Actually, you know what, I have got a  
17 slide, so it's fine.

18 BY MR. GOULD: (Continuing)

19 Q. Dr. Lehr, what is PX 439?

09:53:47 20 A. This is another one of the, you know, documents that I  
21 reviewed in reaching my opinions. It was, you know, a study  
22 that looked at -- it was another study also looking at some of  
23 the same issues that were touched on in the paper I just saw,  
24 looking at what's actually in BitTorrent traffic.

25 And so, what they did was they only identified out of

1 the torrent files, out of 12,500 torrents analyzed, there were  
2 only two files that they offered -- or two torrents that --  
3 files that offered non-infringing content. So that results in  
4 them including that 99.97 percent of content was infringing.

5 So this is another example of research of the sort  
6 that was relied upon by analysts and academics trying to think  
7 about this question of does, you know, peer-to-peer file  
8 sharing result in piracy that harms rights holders?

9 And, you know, it goes to the point of, you know,  
09:54:52 10 people that actually looked at this, documents what was, I  
11 would say, commonly known by people that were thinking about  
12 these issues at the time that, you know, of course, the  
13 traffic, peer-to-peer traffic is almost all illegal copyright.  
14 Q. So how does this -- how do these two articles and the body  
15 of literature tie in with your opinion that this peer-to-peer  
16 infringement causes economic harm?

17 A. Well, what the peer-to-peer does is it basically makes it  
18 extremely easy. So it is kind of like piracy on steroids.  
19 While piracy did happen and has been a problem forever -- you  
09:55:35 20 know, when people did discs, you know, did copyright CDs, that  
21 just wasn't quite the same thing.

22 But if someone can put on the Internet a copy via  
23 broadband connection, especially via a high-speed broadband  
24 connection a copy, the number of times that can be shared is  
25 potentially unlimited.

1 to do that, nor does it actually exist.

2 Q. So there are three points on your slide here. Can you  
3 just walk through and just briefly explain why this data  
4 doesn't exist.

5 A. Sure. So the first issue, problem, if you try to estimate  
6 the revenues -- so I'm trying to figure out how much lower  
7 revenues were as a consequence of the piracy. That's what I  
8 would have needed to have done if I was going to try and  
9 estimate what the economic harm to plaintiffs would be.

09:58:10 10 It was clear to me, after looking at the evidence and  
11 what was available in the literature, that evidence did not  
12 exist. So I didn't attempt to do that.

13 But if you -- the first thing you would have to do is  
14 estimate that Q, how many unit sales would they have sold in a  
15 world without piracy. So to do that, the first thing you have  
16 to do is figure out how many illegal copies are out there as a  
17 consequence of the piracy.

18 So in this case, the data we have is evidence of  
19 infringement using peer-to-peer by subscribers repeatedly, you  
09:58:42 20 know, engaging in infringing activity. We don't observe how  
21 many actual copies were distributed by those subscribers, nor  
22 could we given the way the data was actually collected. So  
23 that at best we have a lower bound estimate of the amount of  
24 infringing activity.

25 So MarkMonitor, which is the principal source of the

1 data, wasn't surveying every Cox subscriber all the time. And  
2 the -- so they wouldn't have known everything that was going  
3 on.

4 And a file, even potentially more important, a file  
5 that is distributed illegally, once it gets out there virally,  
6 how many illegal copies that copy can spawn. You would --  
7 there is no way to precisely estimate that.

8 So that's the Q. You don't know what the Q is. And  
9 the data in the case doesn't allow you to reliably estimate  
09:59:43 10 that, the number of illegal copies.

11 Now, that number of illegal copies isn't -- doesn't  
12 equate directly to the number of sales that would have  
13 happened.

14 Q. Why not?

15 A. Because the second thing you have to know is you have to  
16 know how many of those illegal copies would have -- had they  
17 not existed, would have translated into legal sales.

18 Now, if you say the legal sales would have taken  
19 place at a zero price, then it's okay. But if you say it's a  
10:00:11 20 non-zero price, some of the things that went out there  
21 illegally might not have been bought.

22 So you have to figure out what was the purchasing  
23 behavior of the subscribers, what they would have done if they  
24 hadn't been able to get the pirated copies. And that data  
25 doesn't exist. We don't have detailed data on Cox's

1 Can you -- what information did you consider in  
2 forming this opinion?

3 A. So I actually -- in this case I actually got, it was  
4 closed, a subsample of Cox's data about the levels of  
5 infringement. So excerpts from their CATS system that  
6 documented the -- you know, matched the tickets to subscriber  
7 accounts from 2012 to 2014.

8 So I know what -- how many tickets and when those  
9 tickets arrived for those subscribers in that data.

10:26:11 10 I also received for that subsample of subscribers  
11 from Cox's billing system all of the bills that were billed and  
12 paid by Cox subscribers identified in the CATS data, that  
13 subsample we got, from 2012 to 2016.

14 So I have like month by month this is how much they  
15 paid for the services they got. So I had that data and I  
16 matched that up.

17 And when you match that data up -- there were a few  
18 missing records, you know, in terms of things, but basically  
19 there were 57,279 subscribers that were identified as  
10:27:05 20 infringing. In other words, they had received at least one  
21 ticket, for which I had billing data.

22 Q. And for those 57,000-odd subscribers, what did you  
23 determine Cox billed those customers?

24 A. Well, then having matched those datasets up, you can go  
25 through and you can sum the revenue over whatever period you

1 want. And the period that I summed it over for this table was  
2 from February 2013 to December 2016. And that number for all  
3 those subscribers in that -- those 57,279, it is \$307 million  
4 that were billed.

5 Q. Now, this time frame that you've identified here, why did  
6 you use that time frame?

7 A. I used that time frame because I think it's -- one, it's  
8 the claim period in this case and it's illustrative of this. I  
9 could have used a different time period. I mean, I could have  
10 shown even more, the numbers would be bigger.

11 And I didn't -- I wouldn't -- I didn't -- I stopped  
12 at 2016 because that's all the data I had. I believe a number  
13 of these subscribers were still subscribers and were still  
14 producing revenue. So that would drive the number up if I had  
15 been given data up to the present.

16 And presumably also, since the ticket data ends at  
17 2014, a number of those subscribers received additional tickets  
18 and it's possible that additional, you know, subscribers would  
19 have been provided.

20 So this number here is what the data is. I am  
21 showing you what's in the data and give you an idea of what  
22 it's telling you.

23 Q. I'll turn to 3+ and 5+ in a moment. But I want to  
24 understand what do the amounts that Cox billed and collected  
25 from these customers tell you about Cox's incentives or

1 benefits in respect to infringement or infringing customers?

2 A. Well, there is various standards one might have to  
3 determine, you know, what's infringing. But this is evidence  
4 that I believe -- I think the evidence in this case  
5 demonstrates credibly that Cox knew they had a significant  
6 number of infringing subscribers on their network.

7 And we will talk about other things. Like for  
8 example, they knew they had a lot of peer-to-peer traffic on  
9 their network. And they also knew that peer-to-peer traffic is  
10:29:29 10 almost all infringing traffic.

11 But this is data from their own billing system of  
12 subscribers that were identified to them by the RIAA in the  
13 messages sent to them as these are subscribers engaging in  
14 infringement. And Cox continued to bill these subscribers even  
15 though they were infringing, deriving a direct financial  
16 benefit from these subscribers that is in the hundreds of  
17 millions of dollars.

18 Q. Why have you included in your slide here, Dr. Lehr, an  
19 entry showing direct infringers with just one ticket? How does  
10:30:08 20 that demonstrate Cox's economic incentives versus a direct  
21 infringer who had just one ticket in Cox's system?

22 A. Well, first off, I think to understand what's going on  
23 here, you ought to have some sense of the dataset. So the  
24 dataset begins with infringers that have one or more tickets.  
25 So I think that's the first reason you absolutely want to show



1 it.

2 But the other is because you're trying to get a  
3 handle on evidence that shows that Cox actually benefitted,  
4 that its incentives -- what the theory tells you comports with  
5 what the evidence actually shows and is demonstrated by Cox's  
6 actual behavior.

7 So the theory tells you that a business operates to  
8 generate profits and do the right things. And so, it's in  
9 Cox's incentive to retain profitable subscribers.

10:31:00 10 Cox, indeed, retained profitable subscribers. And it  
11 chose to retain and earn significant revenues and profits from  
12 subscribers that were identified as infringing.

13 Now, you know, whether or not these -- you should  
14 say, oh, you know, those subscribers that only got one ticket  
15 weren't really infringing, I'm not arguing with that. Although  
16 the data suggests that the fact that they got one ticket, given  
17 what I said earlier and given what we know about the nature of  
18 the sampling of the data, means that there is maybe a bunch of  
19 people that never got a ticket that were infringing merrily.

10:31:42 20 They got one ticket and they infringed a lot more, but didn't  
21 get subsequent tickets. And we don't know how many  
22 infringements are associated with the subscriber that got  
23 identified.

24 So I'm not trying to tell you how to map to a number  
25 of infringements. That's not my testimony here. It's about

1 what is their economic incentive to knowingly tolerate having  
2 infringing subscribers on their network.

3 And I believe the \$307 million gives you an idea that  
4 they had a very large economic and financial incentive from  
5 that.

6 Q. Now, when Cox would have considered the value of these  
7 direct infringing subscribers in the context of this economic  
8 incentive opinion, would Cox have considered just some of the  
9 value of that customer, or more of the value of that customer,  
10:32:27 10 or the entire value of that customer?

11 A. Cox is in a continuous business of trying to get  
12 customers, trying to hold on to the customers it has. And  
13 that's especially valuable because it costs money to acquire  
14 customers. And if you already have them, it is much more  
15 profitable to keep them. And so Cox was continuously doing  
16 that. And so, as I said, the economic basic data shows that.

17 This data shows that in fact they were capturing  
18 significant revenue from infringing subscribers. And the fact  
19 that I catch you at some certain point in your career doesn't  
10:33:05 20 mean you weren't infringing before. I don't have ticket data  
21 about what -- some of these subscribers that may have been  
22 subscribers before 2012. I only have data of these subscribers  
23 and the tickets they received between 2012 and 2014. That's a  
24 sliding window. And I don't have the revenue from before.

25 So, these subscribers and the benefit to Cox is

1 greater than the evidence that I have here.

2 Q. Now, looking again at the time frame. If you had limited  
3 this to just the claim period, February 2013 to November 2014,  
4 would that impact your opinion?

5 A. Well, it wouldn't impact my opinion that Cox had a very  
6 significant economic benefit. It would change the numbers  
7 because, for example, it would make the billing charges that  
8 are reported here go down.

9 And just one other point here. These numbers are the  
10:33:58 10 billing charges. The evidence shows and the testimony by Cox  
11 is that the actual revenues received by Cox were almost  
12 99 percent of what was billed.

13 So it's not like this is what was billed, but maybe a  
14 bunch of these people didn't pay their bills. No, most of  
15 these people did pay their bills. And so, the difference  
16 between what was actually received and the billing charges,  
17 it's very close.

18 Q. Okay. So I just want to make sure we understand. What  
19 does the 3+ and 5+ show?

10:34:36 20 A. So, again, my purpose with this is to sort of give you  
21 some sense of what is going on in the data and what we see.

22 So if you say, take that dataset and then only look  
23 at the total billings associated with the subset of subscribers  
24 that had three or more DMCA tickets, the 57,279 subscribers  
25 goes down to 31,514 subscribers. And then the billed charges

1 also goes down to 208 million.

2 And then if you ask the question about, okay, well,  
3 what about 5+ DMCA subscribers, that number goes down to 20,189  
4 subscribers, and their total billed charges were \$164 million.  
5 So, you know, still a very large number.

6 Q. And so, the 5+ is direct infringers who received -- are  
7 there 20,000 direct infringers with 5+ tickets?

8 A. Identified in the subsample of total infringements by the  
9 RIAA that is already, you know, by all reasonable estimates  
10:35:45 10 expected to be a subsample of the total amount of infringing  
11 activity and infringing subscribers that exist on Cox's  
12 network.

13 Q. You talked earlier, sir, about the bundling of products.  
14 How does that factor into this analysis?

15 Can you tell the jury what kinds of services the  
16 customers represent in this slide, subscribed to and paid for.

17 A. Well, this, again, is looking at all the services those  
18 subscribers paid for. So it's not just looking at, you know,  
19 what revenue did they get from these subscribers associated  
10:36:16 20 with their high-speed Internet service. Because that's not how  
21 the service is sold.

22 Customers buy a bundled service. When you buy a  
23 bundled service, you get a different price. In fact, you get a  
24 discount. And consumers want to buy bundled services because  
25 it gives them one point of contact, because it's simpler, they

1 each of the different subscribers. And there are some that  
2 billed lower amounts and some that billed higher amounts. And,  
3 you know, this is a subscriber that billed a fair amount.

4 It turns out that this amount is not that different  
5 than sort of what you might think the average value of  
6 subscriber would be over their lifetime. You know, it's order  
7 of magnitude. It's okay, it's a little bit more valuable. So  
8 this is -- you know, this also would go to a thing of like,  
9 geez, a 101 ticket subscriber also billed \$8,594 in the  
10:44:25 10 subsample of the data that I'm showing.

11 You know, that shows this is an infringing subscriber  
12 that Cox is deriving a direct financial benefit from. And they  
13 were close to 60,000 subscribers that have a different number  
14 like this.

15 But, you know, you look at them and I showed other  
16 ways to think about that with the --

17 Q. But this is a residential. Did you consider a couple of  
18 business customers to demonstrate?

19 A. Yeah, the business -- yes, I did, and the next one is the  
10:44:48 20 business subscriber. The business subscribers were, as I said,  
21 a smaller number, but they account for a lot more dollars per  
22 account typically. And this one was one of the observations  
23 that had one of the highest numbers of tickets in the whole  
24 dataset to give you an idea.

25 So this one got eventually 4,074 tickets. And they

1 NOTE: At this point a recess is taken; at the  
2 conclusion of which the case continues in the absence of the  
3 jury as follow:

4 JURY OUT

5 THE COURT: All right. Joe, let's get our jury,  
6 please.

7 NOTE: At this point the jury returns to the  
8 courtroom; whereupon the case continues as follows:

9 JURY IN

11:09:45 10 THE COURT: All right. Please be seated.

11 Mr. Gould, continue, sir.

12 MR. GOULD: Thank you, Your Honor.

13 BY MR. GOULD: (Continuing)

14 Q. Dr. Lehr, did you reach any conclusions about the relative  
15 value and benefit to Cox of retaining repeat infringing  
16 subscribers?

17 A. Yes, I did. There's -- I considered several types of  
18 evidence to -- regarding this matter.

19 Q. And could you walk us through the basis for this opinion.

11:10:11 20 A. Yeah. First off, when Cox sells its broadband service, it  
21 doesn't have just a single, you know, broadband service. It  
22 offers different tiers. You know, like a -- you know, a low  
23 tier service that's less expensive, provides a lower data rate  
24 and tells the customers that, you know, their data allowance is  
25 going to be less. And that's suitable for people that are

1 going to be really light broadband users.

2 And then it has higher tiers. And the higher the  
3 tier, the higher the price for the service, the more you get.

4 So it's like a lot of things. So it is sort of if  
5 you want to get a fully-loaded car, you pay more for the  
6 extras. You want to have broadband that runs really fast and  
7 has a big data cap, supports multiple users in your household,  
8 these sorts of things, you get a higher tier service. So --

9 Q. You talked about data, but you also just mentioned speed.

11:11:08 10 What does this -- how does the speed impact the tiers?

11 A. Well, they --

12 Q. Or relate to the tiers.

13 A. They -- when they define the nature of the service, they  
14 also tell you what its likely performance is going to be, you  
15 know, so what -- they'll say a data rate up to this certain  
16 speed, and sort of what's the average data rate you could  
17 expect.

18 And so, for certain activities, for example,  
19 downloading files, having something like BitTorrent work and  
11:11:34 20 having a usable experience, you need -- the faster your service  
21 is, the faster the files will download, the better the  
22 experience you'll have if, for example, you're using it to  
23 infringe, which is what it's principally used for, and the  
24 better the experience other subscribers in the BitTorrent, you  
25 know, world will have when they pull the file from you, you

1 know.

2 So if you try to basically, you know, download a file  
3 and the connection is too small, it's like trying to drive on  
4 the highway in a Model T Ford, you know. It's not going to be  
5 a pleasant experience.

6 You know, whereas if you have a very fast speed  
7 service, you'll download files quickly, you can download more  
8 of them. And you'll also, you know, have -- it won't interfere  
9 with other things that you're doing.

11:12:23 10 Q. Now, on this notion of -- the second and third point: P2P  
11 consumes more bandwidth and was a key driver of Cox's  
12 bandwidth.

13 Did you prepare a slide showing some of the  
14 information you considered?

15 A. Yeah, I did. I mean, what's important to understand is  
16 that it -- you know, the broad -- the companies that provide  
17 broadband service have to manage their network and provision  
18 their network for the peak traffic loads. And they also want  
19 to look at sort of what people are doing and what -- you know,  
11:12:55 20 what kind of services they have so they can give those  
21 customers the experience those customers, you know, want and  
22 expect.

23 And so, they look at the different types of traffic.  
24 And if you have someone that all they're doing is e-mail  
25 occasionally, they're not moving a lot of data and they're



1 not -- they don't need a very fast high speed service.

2 If someone's doing something like peer-to-peer,  
3 that's one of the most intensive -- bandwidth intensive  
4 services, both on the upload and the download, that broadband  
5 subscribers do.

6 And this slide is -- you know, pieces out of a  
7 consultancy report that was prepared by this company, inCode  
8 that, you know, provided advice to Cox on sort of, you know,  
9 what they should be expecting in the future, what traffic  
10 looked like in the Internet, what traffic looked like, and what  
11 other, you know, broadband providers around the country were  
12 doing.

13 And what this one says is basically what I've been  
14 saying. Is that peer-to-peer is the most bandwidth intensive  
15 category. And this one shows that, you know, peer-to-peer  
16 households were 13 percent of all broadband households. Which  
17 is a much higher number, for example, than the 60,000  
18 subscribers that have been identified here relative to the  
19 4.5 million broadband subscribers that Cox had.

20 So 60,000 over 4.5 million is well less than  
21 13 percent. Which would suggest and is consistent with the  
22 inference I make that we were only observing a subset of the  
23 actual infringement that was happening on the network.

24 But this is -- this one is showing that this is a  
25 heavy use thing.

1 Now, the lower chart is showing the forecast that  
2 these consultants prepared for sort of the typical household's  
3 monthly usage. And so, there are three lines here. There's a  
4 yellow line, a red line, and a green line. And in its models  
5 for coming up with these forecasts, it characterizes what these  
6 firms -- you know, what these types of households do.

7 So the yellow lines are households that are doing --  
8 you know, using the Internet relatively lightly. And their  
9 bandwidth demand is relatively low. And they're candidates for  
10 this Starter or Essential tier, the lower priced services, you  
11 know, these lower dark blue bands that run across.

12 But if you're in the red band, you need to be in the  
13 Preferred tier.

14 And if you're a green type of customer, you need to  
15 be the Premiere band or the Ultimate tier because your  
16 utilization doesn't fit with the experience you have.

17 Now, the users of peer-to-peer are most likely to be  
18 in this green band or the red band, but certainly not in this  
19 yellow band.

20 So just understanding the character of what  
21 peer-to-peer is and what people are doing, and understanding  
22 that peer-to-peer is almost all infringing activity, Cox is,  
23 you know, listening to and knows -- this is evidence that Cox  
24 internally knew that the customers that were doing peer-to-peer  
25 were more likely to be customers and candidates for its more

1 expensive broadband services.

2 So that's a piece of evidence. That's some of the  
3 evidence that goes with the general understanding of how the  
4 business operates.

5 Q. And how does this tie in, Dr. Lehr, to your opinion that  
6 Cox had an economic incentive to tolerate infringement?

7 A. Well, these customers that are providing and are in the  
8 higher tier services are more profitable than the lower tier  
9 services because almost all the costs of providing the service  
11:16:28 10 to the customers is fixed, it doesn't really depend upon the  
11 actual use of the customers.

12 So, for example, when customers are heavy users, they  
13 may not be heavy users during the peak period, which is when  
14 they size the network.

15 It's like you figure out how big a pipe do I need  
16 during my busiest hour to make sure that the customers that I  
17 promised service to get the service they expect. But if  
18 customers use that pipe when it's not particularly busy, then  
19 that doesn't cost me anything because I have the pipe there  
11:17:00 20 anyways.

21 Q. Now, did you have any access to Cox data that reported the  
22 actual tier, the actual tier that the direct infringing  
23 subscribers in this case subscribed to?

24 A. No, I don't, because the ICOMS billing data just says what  
25 they were billed, but it doesn't tell me what tier those

1 customers were in. And so, I didn't have that data, but I do  
2 have the ICOMS data and the ticket data. So there are things I  
3 can infer from that.

4 Q. So just remind us, sir, what's the ICOMS data?

5 A. The ICOMS data is the internal billing system. So they  
6 keep this for all their subscribers. But, you know, the subset  
7 of the data we got was for those subscribers who had been  
8 identified as infringing subscribers in the CATS data with one  
9 or more DMCA tickets. And then we had their revenue payments  
10 from 2012 to 2016.

11 Q. And were you able to look, sir, at the Cox billing data  
12 for the direct infringers in this case and draw conclusions  
13 about their relative value?

14 A. Yeah. So one of the things you can do is you can say,  
15 let's look at the data payments. So not all the revenues they  
16 billed, but the data payments which shows up in two different  
17 elements within the dataset for each customer. And you can  
18 say, what was the average of only those subscribers, the  
19 average billing per month for only those subscribers that  
20 received one to two tickets? And we can -- can we compare it  
21 to subscribers that received more tickets.

22 And so, for example, can we compare it to subscribers  
23 who got 20 or more tickets? So if you got 20 or more tickets,  
24 the evidence is showing you are, by the evidence, assuming the  
25 evidence straightly maps directly to your infringing behavior,

1 that you're a heavier infringer.

2 When you do that comparison and you apply statistical  
3 tests, you find that there is a statistically significant  
4 increase in the data billed and revenues paid by the more heavy  
5 infringers.

6 So this is data from a limited subsample of Cox's own  
7 internal billing of these infringing subscribers that have been  
8 identified as infringing that statistically shows that there is  
9 a large, 8 percent increase in the data billings to those  
10 subscribers.

11:19:30

11 And that, you know, goes as consistent with the other  
12 stuff, stuff their internal documents and what you would  
13 otherwise infer.

14 Q. What do you mean by statistically significant?

15 A. You apply statistical tests and say, given the size of the  
16 sample I have and the variability in that sample, is this a  
17 difference that looks as if it could be explained as just  
18 random, or does it look like it's actually, you know,  
19 statistically significant.

11:19:56

20 Q. And it looks like -- the 8.4 percent increase, what  
21 charges does that relate to?

22 A. That's just the charges associated with their payment for  
23 data services.

24 Q. And it looks like it's about a six-and-a-half or so dollar  
25 incriminate. \$6 doesn't seem like that big of a difference.

1 Why does that matter here?

2 A. Well, first off, you know, as an economist and someone who  
3 cares about looking at the data, it is statistically  
4 significant. So that matters. 8 percent is a big difference.  
5 That is more an trivial amount.

6 And six bucks does make a difference. It makes a  
7 difference to individual subscribers. I would certainly care  
8 if my bill was \$6 more or less for this.

9 And if you have 60,000 subscribers that there might  
11:20:45 10 be this kind of difference or incentive, or, you know, some  
11 number of subscribers -- you remember, Cox is dealing in  
12 subscriber numbers that are in the millions, hundreds of  
13 thousands, tens of thousands. You multiple that, that's a big  
14 number. That's a big additional incentive.

15 It's not like the subscriber that charges 43 bucks or  
16 even 30 bucks a month in data services isn't profitable for Cox  
17 and Cox doesn't want to retain that subscriber. It's just that  
18 they really want to retain these subscribers that are more  
19 valuable. And if they're higher infringing, it looks like  
11:21:19 20 they're valuable.

21 Q. How does that tie into your opinion that Cox benefited  
22 from retaining these direct infringers?

23 A. Well, it speaks to the economic incentive that Cox had to  
24 retain, you know, repeat infringers on its network even when it  
25 knew, you know, that it had -- these were repeat infringers,

1 and that it's incentives were greater when these repeat  
2 infringers -- there is evidence suggesting that they were even  
3 heavier infringers.

4 Q. I want to move to the next part of this opinion.

5 You said that Cox saved by not addressing  
6 infringement. What do you by that, sir?

7 A. Well, I talked a little bit about that in my opening  
8 statement. So had Cox addressed the infringement more  
9 aggressively, you know, they would have probably had to deal  
11:22:10 10 with more customer service calls. They would have had to mail  
11 more notices and had more interactions to deal with  
12 subscribers. They would have incurred direct costs associated  
13 with the response.

14 They probably couldn't have gotten away with reducing  
15 the personnel of the department that was dealing with the abuse  
16 stuff, as they actually -- as I understand they actually did.

17 But, you know, so they would have incurred additional  
18 costs.

19 Q. Were able to quantify the costs saved by Cox by not  
11:22:44 20 addressing the infringement?

21 A. I wasn't able to quantify these because, first off, I'm  
22 not offering an opinion here about what more and specifically  
23 Cox should have done. And what Cox specifically might have  
24 done would affect what the incremental costs would have been.

25 But certainly they should have done more than they

1 subscribers were terminated.

2 Of those, 597,796 were residential subscribers, and  
3 21,915 were business subscribers.

4 So like any business, if you're selling to someone a  
5 repeat service and they stop paying their bills, the reasonable  
6 thing to do is stop selling them service. And Cox does that.  
7 Cox has to do that on a fairly regular basis because not  
8 everybody pays their bills. This is on the order of 25,000 a  
9 month, is sort of what their terminations are.

11:25:10 10 And they were able to do that level of terminations  
11 and still come up with the profit and loss accounting data that  
12 I looked at.

13 So terminating customers, you know, at some number,  
14 you know, that's below 25,000 a month, is probably not going to  
15 move their costs much because they've accounted for that.

16 It's also worth comparing that to what they actually  
17 did for copyright infringement. So over that period, they only  
18 terminated 32 customer accounts. 32 of them were residential,  
19 0 were business.

11:25:47 20 And of those 32, I believe the ones that are  
21 associated with the 60,000 notices, roughly 60,000 notices that  
22 are associated with the RIAA, was 13. So 13 of something like  
23 57,000, that's all the terminations they did for copyright.

24 So this is additional evidence that I believe  
25 supports the contention that Cox is more than willing to make



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
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VOLUME 8 (P.M. Portion)

TRIAL TRANSCRIPT

December 11, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

1 size it is, Cox's service is more appealing for those  
2 subscribers, is it not, if Cox gives, gives that subscriber  
3 warning after warning, without terminating their service?

4 A. I don't have any substantiation for that.

5 Q. Well, you used the term "friction" in your direct  
6 testimony. Do you recall that?

7 A. I do.

8 Q. Friction is something the customer doesn't want, correct?

9 A. That's correct. That's correct.

10 Q. Something that interferes with them using the service how  
11 they want it, when they want it, right?

12 A. Correct.

13 Q. In the way they want it, right?

14 A. That's correct.

15 Q. For instance, a suspension would be an example of  
16 friction, correct?

17 A. Perhaps. If a customer was suspended for not paying our  
18 bill, regardless of the level of friction it creates, we don't  
19 want to have a relationship with them. If a customer was  
20 suspended for doing something fraudulent or illegal, we  
21 wouldn't mind that friction because we wouldn't want to have a  
22 relationship with them.

23 Q. So your testimony is that if Cox is aware that its  
24 customer has violated the rules for using its service, it  
25 doesn't want a customer relationship with them; correct?

1 A. That is correct.

2 Q. So there'd be no reason for Cox to be told again and again  
3 and again and again of specific subscribers engaging in  
4 infringement but retain them as a customer, would there?

5 A. I don't have details on that, but I can trust that that  
6 would be something we would not want to do.

7 Q. You want your customers to have a deep connection with the  
8 Cox service, right?

9 A. That's right.

10 Q. And friction gets in the way of that, right?

11 A. Correct. It does.

12 Q. For example, if you're identified in notices as being an  
13 infringer and your service is suspended, that's an example of  
14 friction, right?

15 A. Well, if -- again, what we were just talking about, that  
16 may be an example of friction for the consumer that we're  
17 willing to take on because the consumer might be doing  
18 something illegal that we don't want to do business with them.

19 Q. You're aware, as we've been talking about, that Cox has a  
20 set of rules that govern its customers' use of its internet  
21 service, right?

22 A. I am aware of that, yes.

23 Q. It's called an AUP?

24 A. Acceptable Usage (sic) Policy, yes.

25 Q. And one of the things it does is prohibit use of the

1 Q. Okay. Sir, I'm going to remind you of something you said  
2 when I deposed you, which we've already established that you  
3 tried to tell the truth and were under oath, right?

4 A. That's correct.

5 Q. Okay. So page 65 of your deposition, beginning at line 7:  
6 So is downloading of music one of the online activities that  
7 Cox has advertised in terms of activities where speed can be  
8 used?

9 So when downloading music was part of the consumer as  
10 a whole, their need to access internet, the internet, when that  
11 was important and popular, then that was a marketing message  
12 that became effective for us to use.

13 A. That's correct.

14 Q. Okay. So marketing your service to download music has  
15 been effective for Cox, correct?

16 A. Has been effective at different points in time but is not  
17 currently an effective message that we use.

18 Q. So you're saying that today, Cox doesn't advertise  
19 downloading music?

20 A. That's correct.

21 Q. So why don't we look at -- well, are you aware, sir, that  
22 Cox for many years has tried to sell its service by relating  
23 speed to downloading music in the form of a hundred songs in  
24 three seconds?

25 A. That's correct. That is the visual imagery that we were

1 trying to connote when it came to music.

2 Q. Right. So you admit that for many years, including 2013  
3 and '14, Cox has advertised speed in relation to downloading  
4 music, correct?

5 A. I don't know if it was many years, but definitely during  
6 that time frame is correct.

7 Q. And that includes --

8 A. It was in association with our gig internet products, yes.

9 Q. And that includes downloading a hundred songs in three  
10 seconds, right?

11 A. Correct.

12 Q. Right. And by doing the simply math, a hundred songs in  
13 three seconds would be a thousand songs in thirty seconds,  
14 would it not?

15 A. That's correct.

16 Q. Okay. Sir, I'm going to show you a document that's  
17 already been admitted as evidence in this case as PX 1, and I'm  
18 just going to actually just pull it up on the screen. It's not  
19 in the binder that you have in front of you.

20 And I'm going to ask Mr. Duval to scroll through  
21 that -- or actually, excuse me, Mr. Ruelas is helping me out,  
22 making me look good.

23 Why don't you take a few seconds and look at what's  
24 behind tab 1. That's a list of the sound recordings that are  
25 at issue in this case, and there's 6,734 of them. Take a look

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VOLUME 9 (A.M. Portion)

TRIAL TRANSCRIPT

December 12, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

1 that's -- I hope that answers your question.

2 Q. So why, why did Cox have a graduated response program?  
3 What was the purpose of it?

4 A. I'll give you my opinion because I don't speak for Cox,  
5 but my opinion was that Cox recognized that there was a real  
6 issue and a real problem with, with copyright infringement, and  
7 that your clients, the recording industry, had some, some  
8 proper concerns about it, and that our customers needed to  
9 understand better why that was a problem and that -- and that  
10 copying music, let's say, without paying for it was not the  
11 right thing to do.

12 And so we, we wanted to -- I think Cox wanted to find  
13 a way to help your clients and our customers understand -- I'm  
14 sorry -- your clients with this problem and our customers with  
15 some ignorance, understand what was the right thing to do,  
16 and -- so they tried to design a system that would deal with  
17 that, would fix it.

18 Q. So you began your answer, Mr. Cadenhead, by saying your  
19 opinion, but you don't speak for Cox. Just to be clear, I want  
20 to know what you understood at the time you were at Cox was the  
21 purpose of the graduated response program.

22 A. That's what I think it was.

23 Q. So you understood that the purpose was to address real  
24 problems with copyright infringement that copyright owners  
25 had --

1 Q. Why not?

2 A. Because you're, you're describing it as if Cox was doing  
3 something actively, and I, I don't remember that being the  
4 case.

5 Q. What do you recall it being?

6 A. When Cox got a notice, it started its graduated response  
7 process.

8 Q. And during that process, did Cox find a way to prevent the  
9 subscriber from infringing?

10 A. The process was meant, as I understood it, to educate the  
11 customer so that the customer would not do that.

12 Q. So as you oversaw the graduated response program, you  
13 recognized that some of Cox's subscribers may be infringing  
14 copyrights intentionally, correct?

15 A. Well, I, I oversaw it from a legal standpoint, and I, I  
16 think the program -- the process recognized that some customers  
17 were infringing and almost certainly knew they were infringing  
18 and needed to stop, and we tried to get them to stop.

19 Q. Was there a point in time when Cox instituted a policy --  
20 a graduated response policy that had a specific number of steps  
21 before a customer would be terminated?

22 A. Cox began with notifying the customer through several  
23 means and steps, which varied over time. Cox required that  
24 there be an actual communication between a knowledgeable  
25 representative at Cox and the customer at least once and



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VOLUME 10 (A.M. Portion)

TRIAL TRANSCRIPT

December 16, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

1 have considered is relevant, and it may -- you know, I mean,  
2 he's answered -- I don't -- it doesn't change my opinion, but I  
3 think it's in the wheelhouse. So I'm going to allow it.

4 MR. ELKIN: All right. Thank you, Your Honor.

5 THE COURT: All right. Thank you.

6 NOTE: The sidebar discussion is concluded; whereupon  
7 the case continues before the jury as follows:

8 BEFORE THE JURY

9 THE COURT: All right. You've heard some testimony  
10 about, you know, getting back into graduated response and when  
11 Cox took -- may have taken certain actions. Those were  
12 hypothetical questions and not assuming facts in evidence. So  
13 just consider them as that, okay? Thank you.

14 All right. Please continue, Mr. Gould.

15 BY MR. GOULD:

16 Q. Sir, you also agree that if Cox had terminated this  
17 customer after three or five tickets, it wouldn't have billed  
18 or received internet revenue from that customer during the  
19 period of that termination, correct?

20 A. In that hypothetical, during whatever that period of  
21 termination would be, however that's defined, that would be  
22 true by definition.

23 Q. And I want to take a look at one more of these charts,  
24 sir, a similar chart for a business customer that was a  
25 fraternity. You recall this slide and testimony about it?

1 I don't think that's exactly right, but for purposes of moving  
2 things along, I'll accept it.

3 Q. You recall this slide, sir?

4 A. Yes.

5 Q. And when you talked about this slide, you talked about  
6 that the infringing activity was a small amount of the user's  
7 activity or something along those lines, right?

8 A. I don't think I actually said that, but I did say that  
9 context is important, yes.

10 Q. Well, I may have misheard because I didn't expect it, but  
11 I thought you did. You didn't do any measurement or analysis  
12 or study to determine the amount of peer-to-peer activity  
13 occurring on Cox's network, did you?

14 A. I know the subscribers, I know some information that I've  
15 read, but I haven't done, like, created an equation with that  
16 in it.

17 Q. And you don't dispute or disagree that peer-to-peer is a  
18 highly bandwidth-intensive activity, do you?

19 A. When it's done, it's bandwidth intensive. The question  
20 is, like, when it's done relative to everything else that's  
21 happening --

22 Q. And you -- I'm sorry.

23 A. -- that might be -- might go to what you're asking.

24 But when it's done, it takes a fair amount of data,  
25 yes.

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VOLUME 10 (P.M. Portion)

TRIAL TRANSCRIPT

December 16, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

1 A. It does not.

2 Q. Does ICOMS contain information that would show whether a  
3 subscriber's internet service was limited to particular  
4 categories of end users like employees, contractors, guests, or  
5 the like?

6 A. It does not.

7 Q. In addition to ICOMS, does Cox also have other databases  
8 and systems?

9 A. We have very many, many databases and systems, yes.

14:31:36 10 Q. Mr. Jarchow, to what extent do you have knowledge of Cox's  
11 other databases and systems beyond ICOMS?

12 A. My primary job responsibilities are related to ICOMS. I  
13 have one or two ancillary databases that I have access to.

14 Q. And, sir, are you personally aware of any database or  
15 system at Cox with information about whether a subscriber uses  
16 its Cox internet service for public WiFi versus for a secure  
17 computer network or for both?

18 A. No, I do not.

19 Q. Mr. Jarchow, in connection with this lawsuit, were you  
14:32:09 20 asked to retrieve information about certain subscribers from  
21 the ICOMS system?

22 A. Yes.

23 Q. And how do you identify the subscribers whose information  
24 you were asked to retrieve?

25 A. A list of account numbers was provided by Brent Beck, and

1 Q. And Cox hasn't provided the names of the residential  
2 customers, correct?

3 A. It has not.

4 Q. You understand that the business customers were given an  
5 opportunity to object in court to the disclosure of their  
6 names?

7 A. Yes.

8 Q. And you mentioned, I think, two that you said did?

9 A. Yes, sir.

14:39:52 10 MR. GOULD: Could you pull up DX 358, please?

11 Please scroll to the top, please.

12 BY MR. GOULD:

13 Q. Mr. Jarchow, this is DX 358, which has the bulk of those  
14 customers' names, correct?

15 A. Yes, sir.

16 Q. I think it was about 2,700 or so that were on this  
17 particular spreadsheet, give or take.

18 A. Yes.

19 Q. Now, if we look at some of the names of the business  
14:40:32 20 customers, No. 5 is Olympia Skate Center, and right below that  
21 is a Computers & More, right? And you keep going down and you  
22 can see there's a college, and one's a fire station.

23 If you keep scrolling down, towards the bottom,  
24 Margaritas, let's see, line 21 says Margaritas Mexican Bar &  
25 Grill. And right below that is Cars R Us.

1 Did I read those correctly?

2 A. That's what I'm reading, yes, sir.

3 MR. GOULD: If you could just click down another  
4 page?

5 BY MR. GOULD:

6 Q. Let's take a look at some of the other names. There's a  
7 couple of Starbucks, right?

8 A. Yes.

9 Q. And there's an art gallery, correct, at line 49?

14:41:27 10 A. Yes.

11 Q. Let's take a look at another page, okay? Line 79, there's  
12 something called Crystal Chandelier, right? And then an  
13 infirmary and a diner and a coffee shop, and then at 87, you  
14 see Sal's Seafood and Chicken.

15 Did I read those correctly?

16 A. Yes, sir. And 86, Staybridge Suites.

17 Q. Let's take a look at another page. At line 103, you have  
18 5 Minute Oil Change Shop. Below that is a barbershop, and then  
19 at 106, there's a Pipes R Us Plumbing, correct?

14:42:09 20 A. Yes, sir.

21 Q. Okay. Let's take a look at another page. At the top,  
22 you've got a nail and spa, right?

23 A. Yes, sir.

24 Q. And at 117, there's a restaurant and oyster bar?

25 A. And 116, Benchmark Communications.

1 Q. Yeah. And at 122, we have Cairo Cafe?

2 A. That's correct.

3 Q. There's a TGI Fridays right at the bottom?

4 A. Yes.

5 Q. Let's just look at one more page to get a sense here. At  
6 155, you have Smooth Movers, correct?

7 A. That's correct.

8 Q. And 166, something called Underground Audio? Did I read  
9 that correctly?

14:43:01 10 A. That's correct.

11 Q. And these are fairly representative of the types of  
12 customers and names that are listed in these three exhibits,  
13 correct?

14 A. In general, yes.

15 Q. And there's also a handful of hospitals, doctor's offices  
16 or medical centers, right?

17 A. Doctors' offices, medical centers, library, government  
18 facilities, yeah.

19 Q. Saw a couple of volunteer fire stations, correct? Sound  
14:43:34 20 familiar? You've looked at these?

21 A. Yes.

22 Q. You understand, sir, that Cox has argued in this case that  
23 it can't be expected to terminate Internet service of business  
24 customers for copyright violations if those customers are  
25 hospitals, police, fire, or other critical infrastructure?



1 MS. GOLINVEAUX: Objection, Your Honor. Scope.

2 MR. GOULD: Your Honor, this witness is listed on our  
3 exhibit list as well.

4 THE COURT: Yeah, I'm going to allow the question.  
5 Your exception is noted. Thank you.

6 BY MR. GOULD:

7 Q. Sir, do you understand that Cox has argued in this case  
8 that it can't be expected to terminate internet service for  
9 business customers for copyright violations if those customers  
10 may include critical infrastructure or health care services?

11 A. I understand.

12 Q. And I think you testified that the ICOMS database from  
13 which this information came doesn't actually tell Cox what the  
14 customer uses that service for, correct?

15 A. That is correct.

16 Q. It could include a field here that says it's used for  
17 WiFi, right?

18 A. Managed WiFi. If we sold them managed WiFi service.

19 Q. You could include a field that says this customer used our  
20 service for WiFi, correct?

21 A. If we sold them managed WiFi service.

22 Q. But there's no way to distinguish based on the billing  
23 records or the ICOMS database whether those WiFi users were  
24 using some secured private network or a public WiFi network,  
25 correct?

1 refreshes your recollection. If you look at the first sentence  
2 of paragraph 2, does this refresh your recollection that your  
3 current job duties focus on the technical support of the  
4 business systems that Cox Communications uses to provide its  
5 services?

6 A. The first sentence, but the second sentence, the primary  
7 system I'm responsible for is ICOMS customer subscriber  
8 management system, yes.

9 Q. Sir, you recall submitting a sworn declaration in this  
10 case in which you testified that your current job duties focus  
11 on the technical support of the business systems that Cox  
12 Communications uses to provide its services?

13 A. Yes.

14 Q. And do you agree with that?

15 A. With the primary system, I'm responsible for it, being  
16 ICOMS, yes.

17 Q. So I'm just asking you about the first sentence in your  
18 sworn declaration. Your job duties focus on the technical  
19 support of the business systems that Cox Communications uses to  
20 provide its services. Is that your job duties or not?

21 A. Yes, sir.

22 Q. So we already talked about ICOMS, but given those job  
23 duties, I think what you're saying is beyond ICOMS, you're also  
24 not aware of any other databases at Cox that contain  
25 information about whether a Cox Business customer at issue here

1 used their internet service to provide emergency services,  
2 correct?

3 A. I don't manage any other systems at Cox. I communicate  
4 with leaders that do manage those other systems, yes.

5 Q. You just don't know?

6 A. I don't know.

7 Q. And the same is true of whether any of these customers  
8 provide critical infrastructure services through Cox's internet  
9 services, correct?

14:48:41 10 A. That's not subject to my --

11 Q. I think you testified that you have reviewed an objection  
12 to disclosure of the customer's name from a hospital to whom  
13 Cox provides internet service, correct?

14 A. I have reviewed that.

15 Q. And I wasn't sure I understood what you said. I want to  
16 make sure I got it correctly. I think you said that the  
17 hospital reported that its internal secured network for  
18 employees and health services was operated by someone different  
19 than Cox, correct?

14:49:14 20 A. That is what was filed.

21 Q. And the hospital said that -- the only thing that the  
22 hospital said in its statement was that it purchased internet  
23 access that it used for public WiFi from Cox, correct?

24 A. That was what was in the filing, yes.

25 MR. GOULD: I have no further questions.

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VOLUME 11 (A.M. Portion)

TRIAL TRANSCRIPT

December 17, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

1 That's the question, was the analysis done at the time of his  
2 report, and the answer is no.

3 THE COURT: All right. All right. The motion to  
4 preclude the exhibits which contain the lower portions of 13  
5 and 21, 22, 23, 26, and the last two, the motion is granted.  
6 Those will be amended -- or not presented. I find that the --  
7 in going over the reports, and in particular, the pages that  
8 defendants have pointed to, that the analysis was not done.  
9 There has been no notice that Mr. Tregillis was going to  
10 testify about those matters.

11 This is clearly outside of the report, the summaries  
12 that he gave of what his testimony was going to be, and  
13 although they're not, as Mr. Buchanan pointed out, the most  
14 resounding modifications, they are modifications, and they do  
15 change the dynamics of his report, and that's -- it's  
16 impermissible to do that this late in the -- on the last day of  
17 trial. So the motion is granted to just -- those will be --  
18 exhibits will either be redacted or they won't be used.

19 All right. What else do we have this morning?

20 MR. OPPENHEIM: I don't think anything else at the  
21 moment, Your Honor.

22 THE COURT: Okay. All right. What -- does that --  
23 who is -- Tregillis is the next witness? Is that --

24 MR. ELKIN: No, Your Honor. We're calling  
25 Mr. Mencher.

1 Q. And we talked about -- you talked a little bit about the  
2 different tiers of service. Do you recall that, the internet  
3 tiers of service?

4 A. Yes.

5 Q. And generally, the higher the bandwidth and the higher the  
6 speed, the higher the price for that service, correct?

7 A. Yes.

8 Q. And the different prices that Cox charges its tiers of  
9 internet service factor into Cox's profitability?

10 A. Yes.

11 Q. And the payments received from customers that Cox retains  
12 factors into Cox's profitability?

13 A. Yes. The payments we receive and the payments we don't  
14 receive, for that matter, both factor into profitability.

15 Q. Does Cox collect more revenue from a customer that it  
16 terminates for copyright infringement or that it retains on its  
17 network?

18 A. I'm not familiar with what we terminate or don't terminate  
19 for a copyright infringement. What I can say is customers that  
20 we have, we get revenue from, and customers that we don't have,  
21 we don't get revenue from.

22 Q. And that would include customers terminated for copyright  
23 infringement, correct?

24 A. Again, I don't know whether we are terminating or what's  
25 the process for terminating customers for copyright

1 infringement, so it's difficult for me to answer that question  
2 directly.

3 Q. Are you saying you're not aware of whether Cox terminates  
4 customers for copyright infringement violations?

5 A. I'm not aware -- I don't -- I'm not familiar with the  
6 details of the process through which customers get terminated,  
7 so it's, it's difficult for me to say.

8 Q. You're the vice president of finance and accounting. Are  
9 you aware, yes or no, whether Cox terminates customers for  
10 copyright infringement violations?

11 A. I believe we do.

12 Q. And if a customer is terminated for a copyright violation,  
13 does Cox collect more revenue from that customer or a customer  
14 that it keeps on its network?

15 A. Any customer that is terminated, we will no longer collect  
16 revenue from.

17 Q. You talked about Cox not charging data overage fees. Did  
18 I get that right?

19 A. Yes.

20 Q. You're talking about a particular time frame, though,  
21 aren't you?

22 A. I am.

23 Q. Because starting in 2015, Cox actually began charging data  
24 overage fees, correct?

25 A. I don't remember the exact date, but we do collect overage

1 Q. That's what you said, right?

2 A. No. I think the data are available to instruct on that.  
3 And they tell us that that viral idea you're talking about  
4 isn't happening. But I appreciate the concept.

5 Q. Well, sir, that -- what you just mentioned wasn't part of  
6 your analysis in this case, was it?

7 A. Yes, it was.

8 Q. Sir, a few moments ago I asked you whether you agreed with  
9 Dr. Lehr that actual damages -- that we can't calculate them  
10 because the universe of distributions is unknown. And you  
11 agreed with me, correct?

12 And that's a yes or no.

13 MR. BUCHANAN: I don't think that was the question,  
14 about actual damages, Your Honor.

15 THE COURT: He's --

16 MR. ZEBRAK: Let me move on, Your Honor.

17 THE COURT: He can't determine -- yeah, reask the  
18 question.

19 MR. ZEBRAK: Yeah.

20 BY MR. ZEBRAK: (Continuing)

21 Q. Nobody knows how many distributions occurred here,  
22 correct?

23 A. I agree with you on that.

24 Q. Right. And it was for that reason that Dr. Lehr was  
25 looking at Cox's economic incentives, rather than just doing



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TRIAL TRANSCRIPT

December 17, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

1 correct?

2 A. Right. The revenue share that would go to the  
3 plaintiffs, a dollar.

4 Q. Okay. So before lunch, we already talked about what you  
5 used for the quantity. I'd like to now talk about the royalty  
6 rate that you applied. Okay?

7 A. Okay. Great.

8 Q. Now, you used a dollar per notice, right?

9 A. Right.

10 Q. Okay. And you used the dollar because that was your  
11 calculation, sort of the average cost of a single-track  
12 download from iTunes, correct?

13 A. Not exactly. A single-track download from iTunes is  
14 somewhere between \$0.79 and \$1.29. In production, you and  
15 your clients provided information that told me how much of  
16 that you get, and for sound recordings, you get up to about  
17 \$0.90, and for musical compositions, you get \$0.10. So I used  
18 all of that, assuming you get all of the musical compositions  
19 and all sound recordings, even though those -- that's not  
20 actually the case, but that's where those come from, is your  
21 disclosures.

22 Q. All right. The activity for which that rate applied was  
23 the single-track download for digital download from iTunes,  
24 correct?

25 A. It's based on the \$0.79 up to a \$1.29 for a single-track

1 download, that's right.

2 Q. Right. And you looked to the single-track download rate  
3 because you understood that these tracks were available for  
4 purchase on an individual basis on iTunes, correct?

5 A. Right.

6 Q. Now, in choosing a royalty rate, it's true, is it not,  
7 sir, that it's important that the royalty rate fit the  
8 economic realities of the situation that you're applying it  
9 toward, correct?

10 A. Yes.

11 Q. And the single-track download rate when someone buys a  
12 track from iTunes, that's the rate for obtaining the track for  
13 personal use, correct?

14 A. Yes.

15 Q. That price is not the price for authorization to  
16 distribute it to countless people through a peer-to-peer  
17 network, correct?

18 A. That's right. It's for an individual to purchase and use  
19 that track. That's my understanding of it.

20 Q. Right. And it's also your understanding, sir, that  
21 plaintiffs have never granted a license for anyone to  
22 distribute their music all across peer-to-peer networks on an  
23 unlimited basis, correct?

24 A. That's right.

25 Q. The cost of that would be enormous, correct?

1     apparently let most of the businesses just skate in terms of  
2     these notices, and so they were much more lenient in my  
3     observation with their business customers.

4     Q.   Not necessarily with respect to copyright infringement  
5     per se, but in running your various businesses, did you have  
6     occasion to work with business customers on compliance issues?

7     A.   In, in my European operations, probably 70 percent of my  
8     business was business customers; and, you know, spanning  
9     multiple countries in multiple legal environments, I had  
10    probably as many lawyers as, as employees at this point  
11    because every country had a different set of laws; and  
12    compliance -- being compliant with the law is a very critical  
13    factor.

14                 So with the business customers, we typically entered  
15    into contracts.  There were the AUP-type things that went in  
16    there that says:  This is an acceptable use.

17                 And each country had its own little changes in  
18    acceptable use; and we managed to successfully navigate those  
19    waters by having good contracts, good acceptable use policies.  
20    We basically maintained our ability to verify that they were  
21    being followed, and that went fairly well.

22    Q.   Dr. McGarty, you were here when Dr. Almeroth testified  
23    for Cox, correct?

24    A.   Yes, sir.

25    Q.   I'm not saying his words precisely, but do you recall

1 I expected that there would be testimony about how  
2 many of these sound recordings were also music compositions,  
3 and the jury would be -- would have that evidence through the  
4 witness stand when they were deliberating.

5 I mean, it's a close issue even to begin with as to  
6 whether in this day and age, when the courts have clearly been  
7 looking at the independent value of the works versus whether  
8 they're music compositions and sound recordings, and I'm not  
9 sure that Mr. Oppenheim isn't correct that we shouldn't even  
10 be looking at the traditional Second Circuit analysis that  
11 you've cited and is one of the governing cases, but I just  
12 don't see that there's evidence from which they could collect  
13 and cull and determine whether they wanted to combine the  
14 statutory damages award for those works that are -- contained  
15 both sound recordings and music compositions.

16 So I'm going to find that they should be allowed to  
17 deliberate on the 10,017 individual works, regardless of  
18 whether they're compositions or sound recordings, and your  
19 exception, of course, is noted.

20 The other issue on mitigation, you know, I didn't  
21 know how that would go in the course of the trial, but, you  
22 know, clearly we had the instruction that I gave in BMG  
23 talking about the -- that the mitigation instruction included  
24 both that plaintiffs had failed to use reasonable efforts to  
25 mitigate damages and also that the amount by which damages